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LINCOLN'S INN FIELDS, W.C.

TO THE

RIGHT HON. ROUNDELL BARON SELBORNE, &c., &c.

UNDER WHOSE AUSPICES

THE GREAT WORK OF CONSOLIDATING INTO AN HARMONIOUS WHOLE

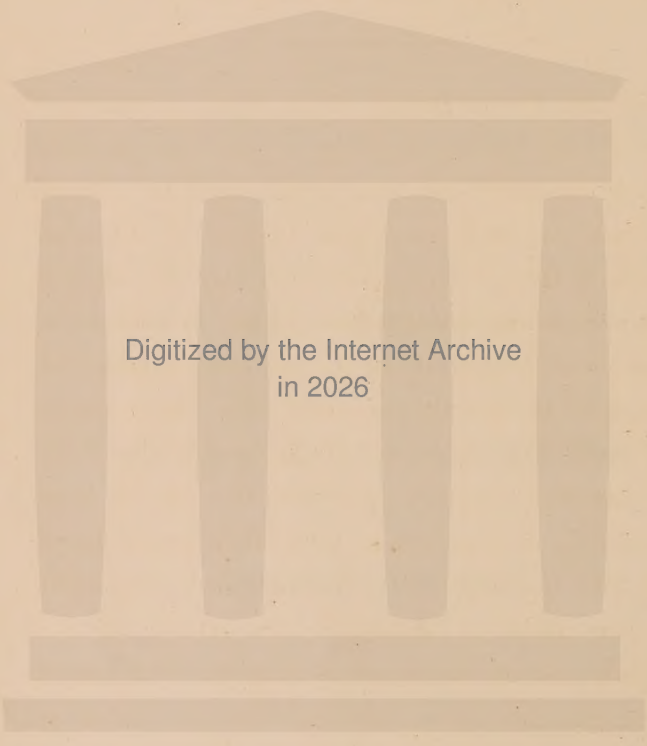
THE VARIOUS AND DISCORDANT SYSTEMS OF ENGLISH JUDICATURE

WAS SUCCESSFULLY INAUGURATED,

THE FIFTH EDITION OF THIS WORK

IS BY PERMISSION

Respectfully Inscribed.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PREFACE TO THE FIFTH EDITION.

SINCE the Fourth Edition of this work was published the entire practice and procedure of what was once the Court of Chancery has been recast, and, to outward appearance at least, assimilated to that of the other Divisions of the new Supreme Court. Had the effect of the late legislative changes been simply to abolish the old practice and substitute for it a new code of procedure, the work of the practitioner would have been comparatively easy. But the recent Judicature Acts, and the Rules engrafted thereon, by providing that the old forms and methods of procedure, as far as they are not inconsistent with the new order of things, shall continue in force, have in effect preserved by the side of the new practice a mass of Orders and Regulations which cannot, without great care and labour, be disentangled from those which have been expressly or impliedly swept away.

One of the objects of the present edition of this book (which to this extent is really a new work) has been to present, in a clear and compendious form, side by side with the Judicature Acts and Rules of Court, the substance of the Consolidated and other Orders of the Court

of Chancery, which, though not expressly incorporated in the new enactments are, by implication, left untouched by them. The difficulty of such an undertaking will be best appreciated by those who have themselves attempted a similar task.

For convenience of reference the older Orders and Regulations are printed in italics. The Rules of Court regulating the practice of the other divisions of the High Court of Justice are (with the exception of those relating exclusively to the Probate and Admiralty Divisions which have been omitted) printed in smaller type.

In addition to the Statutes already published, and to the Judicature Acts and Rules, the present edition contains many important Acts, within the original scope of the work, which have been passed since the publication of the last edition.

The numerous cases decided up to the time of publication upon the Statutes and Orders comprised in the work have been collected and classified in the notes.

In conclusion the Authors, while fully sensible of the shortcomings of their work, venture to offer it to the profession in the hope that it may meet with the same indulgent reception which has been accorded to the four preceding editions.

LINCOLN'S INN, *November*, 1876.

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ERRATA AND ADDENDA.

Page 2, line 14 from top, the Act does not give to the party seeking to perpetuate testimony, rights stronger than those which belong to him as an actual and present litigant. Per Lord Hatherley, C., in *Campbell* v. *Earl of Dalhousie*, L. R. 1 Sc. App. 462, 464.

„ 36, „ 19 from bottom, *Re Derby Municipal Estates*, is now reported in L. R. 3 Ch. Div. 289.

„ 36, „ 10 from bottom, *Re Speer* is now reported in L. R. 3 Ch. Div. 262.

„ 39, „ 14 from bottom, *Re Fryer* was followed in *Re Southwold Railway Co.'s Bill*, L. R. 1 Ch. Div. 697, cited in p. 61.

„ 54, „ 4 from top, *Re Dowling* is now reported in 24 W. R. 729.

„ 71, „ 14 from bottom, *Re La Touche* was followed in *Re Bird*, L. R. 3 Ch. Div. 214.

„ 79, „ 19 from bottom, *Re Watkin* is now reported *sub nom. Re Walker*, L. R. 3 Ch. Div. 209.

„ 80, „ 10 from top, *Gardner* v. *Cowles* is now reported in L. R. 3 Ch. Div. 304.

„ 80, „ 3 from bottom, see, too, *Re Vickers*, L. R. 3 Ch. Div. 112, when it was held that a petition for appointment of new trustees in the place of two deceased trustees, and a trustee of unsound mind not so found by inquisition, no vesting order being required, might be presented in Chancery and not in Lunacy.

„ 101, „ 17 from bottom, see, too, *Re Gillatt*, 25 W. R. 23.

„ 222, „ 23 from top; page 241, line 15 from top, *Taylor* v. *Taylor* was affirmed on appeal, L. R. 3 Ch. Div. 145.

„ 224, „ 18 from top, *Re Pott's Estate* and *Eyre* v. *Saunders* were disapproved of by the M. R., in *Bailey* v. *Holmes*, 24 W. R. 1068.

„ 241, „ 16 from top, see *Re Thorp*, W. N. (1876), 251.

„ 289, „ 9 from bottom, *Pryor* v. *Pryor* was affirmed on appeal L. R. 10 Ch. 469.

Page 289, line 6 from bottom, *Teall* v. *Watts* was followed in preference to *Aston* v. *Meredith*, in *Holland* v. *Holland*, L. R. 13 Eq. 406.

„ 290, „ 10 from top, for "18 Eq. 269," read "15 Eq. 269." In the case referred to the Court declined to follow *France* v. *France*, or to make any order as to costs before the further consideration.

„ 292, „ 18 from bottom, *Hurry* v. *Hurry* is also reported in L. R. 10 Eq. 346.

„ 337, „ 12 from top, see *Le Blanch* v. *Reuter's Telegram Co.*, L. R. 1 Exch. Div. 408.

„ 343, „ 8 from top, a counter-claim cannot be set up which does not seek relief against the plaintiff, *Warner* v. *Twining*, 24 W. R. 536.

„ 343, „ 18 from bottom, see *Re Stapleford Colliery Co.*, 24 W. R. 173; *Re United Kingdom Electric Telegraph Co.*, *ibid.*, 593

„ 357, „ 15 from bottom, page 549, line 10 from top, *Re Leigh* is now reported in L. R. 3 Ch. Div. 292.

„ 433, „ 21 from bottom, page 459, line 11 from bottom, *Scott* v. *Royal Wax Candle Co.*, is now reported in L. R. 1 Q. B. Div. 404, and was followed in *Bacon* v. *Turner*, L. R. 3 Ch. Div. 275.

„ 446, „ 8 from top, see, too, *Re Smith*, *McMurray* v. *Mathew*, 33 L. T. N. S. 804.

„ 446, „ 12 from bottom, see, too, *Houseman* v. *Houseman*, L. R. 1 Ch. Div. 235.

„ 448, „ 10 from bottom, as to cases where the writ has been lost after renewal, and the time for issuing a concurrent writ has expired, see *Davis* v. *Garland*, L. R. 1 Q. B. Div. 250.

„ 448, last line, see, too, *Beddington* v. *Beddington*, 24 W. R. 348.

„ 456, line 4 from bottom, where effectual personal service of a writ could not be made on persons named as defendants, the Court refused to order substituted service under this rule, *Slowman* v. *Governor of New Zealand*, L. R. 1 C. P. Div. 563.

„ 459, „ 22 from bottom, see *Casey* v. *Arnott*, W. N. (1876) 252.

„ 460, „ 2 from top, *Preston* v. *Lamont* is now reported in L. R. 1 Ex. Div. 361.

„ 460, „ 9 from top; page 482, lines 16 and 27 from bottom, *Swansea Shipping Co.* v. *Duncan* is now reported in L. R. 1 Q. B. Div. 644.

„ 471, „ 26 from top, *Runnacles* v. *Mesquita* is now reported in L. R. 1 Q. B. Div. 416.

Page 474, line 5 from top, *Tildesley* v. *Harper* is now reported in L. R. 3 Ch. Div. 277.

„ 481, „ 23 from top, *New Westminster Brewery Co.* v. *Hannah* is also reported on this point in 24 W. R. 899.

„ 482, „ 15 from bottom, *Bower* v. *Hartley* is now reported in L. R. 1 Q. B. Div. 652.

„ 491, „ 13 from top; page 492, line 12 from top, line 3 from bottom, *Hillman* v. *Mayhew* is now reported in L. R. 1 Exch. Div. 132.

„ 491, „ 17 from bottom; page 501, line 15 from bottom; page 512, line 20 from top, *Earp* v. *Henderson* is now reported in L. R. 3 Ch. Div. 254.

„ 492, „ 6 from top; page 499, first line; page 503, line 22 from top; *Rolfe* v. *Maclaren* is now reported in L. R. 3 Ch. Div. 106.

„ 495, „ 8 from bottom, *Foster* v. *Gamgee* is now reported in L. R. 1 Q. B. Div. 666.

„ 496, „ 16 from bottom; page 510, line 14 from top, *Higginbottom* v. *Aynsley* is now reported in L. R. 3 Ch. Div. 288.

„ 502, „ 5 from bottom, it seems that an appeal will not generally lie from an order made under this rule; *Golding* v. *Wharton, &c., Railway Co.*, L. R. 1 Q. B. Div. 374.

„ 503, „ 23 from top, see further as to striking out irrelevant statements, *Blake* v. *Albion Life Assurance Society*, 45 L. J. C. P. 663.

„ 505, „ 16 from bottom, see further as to admissions on demurrer, *Watson* v. *Hawkins*, 24 W. R. 884.

511, „ 14 from bottom, see, too, *Palin* v. *Brookes*, 24 W. R. 20.

„ 511, „ 11 from bottom, see as to actions commenced under the old practice, *Culley* v. *Buttifant*, L. R. 1 Ch. Div. 84; *Provident, &c., Society* v. *Greenhill*, *ibid.* 624.

„ 514, „ 20 from top, *Mercier* v. *Cotton*, is now reported in L. R. 1 Q. B. Div. 442.

„ 515, „ 19 from bottom, *Republic of Costa Rica* v. *Erlanger*, is now reported in L. R. 1 Ch. Div. 171.

„ 517, „ 17 from bottom; 521, line 23 from top, *Bustros* v. *White*, is now reported in L. R. 1 Q. B. 423.

„ 517, „ 16 from bottom, see, too, *Mostyn* v. *West Mostyn Coal Co.*, L. R. 1 C. P. D. 143, 34 L. T. N. S. 531; *Bacon* v. *Bacon*, *ibid.*, 349.

„ 520, „ 7 from top, *Re National Funds Assurance Co.*, is reported also in 24 W. R. 774.

„ 521, „ 15 from top, as to what description must be given of documents in respect of which privilege is claimed, see *Fortescue* v. *Fortescue*, 24 W. R. 945; *Taylor* v. *Oliver*, 34 L. T. N. S. 902.

Page 533, line 17 from top, in a clear case the judge may order a special case to be stated before statement of claim is delivered, *Metropolitan Board of Works* v. *New River Co.*, 45 L. J. Q. B. 759.

„ 539, „ 9 from bottom ; 547, line 14 from bottom ; 614, line 18 from top, *Swindell* v. *Birmingham Syndicate*, is now reported in L. R. 3 Ch. Div. 127.

„ 549, „ 9 from top, for "45 C. D. 692; L. J. Ch. 414," read "2 C. D. 692 ; 45 L. J. Ch. 414."

„ 573, first line, for form of writ, see *Bolton* v. *Bolton*, L. R. 3 Ch. Div. 276.

„ 579, line 17 from top, *Dallas* v. *Glyn*, is now reported in L. R. 3 Ch. Div. 190 ; from this case it would seem that the rule applies to *all* orders made since the act came into force.

„ 580 „ 18 from top, compensation for lands in respect of which a public company has given notice to treat is not "a debt owing" within the rule, *Richardson* v. *Elmit*, W. N. (1876) 252.

„ 582, last line, *Burns* v. *Irving*, is now reported in L. R. 3 Ch. Div. 291.

„ 590, line 11 from bottom, the rule was applied to the bankruptcy of a sole plaintiff, *Wright* v. *Swindon, &c., Rly. Co.*, W. N. (1876) 250.

„ 592, „ 12 from bottom, this rule does not enable a judge who has made an order on a winding-up petition to direct the transfer to himself of another petition to wind up the same company, *Re National Funds Assurance Co.*, 25 W. R. 23.

„ 598, „ 23 from bottom, for "450," read "550."

„ 603, „ 12 from bottom, see *Paxton* v. *Bell*, on Appeal, W. N. (1876) 249.

„ 605, „ 30 from top, for 2 W. R. 452, read 2 P. W. 452.

„ 608, „ 14 from bottom, note (*f*), see, too, *Earp* v. *Henderson*, L. R. 3 Ch. Div. 254, 259.

Appendix, page i., line 8 from top, if the statement of claim in a creditor's action for administration states that the plaintiff sues on behalf of all creditors, it is not necessary that the writ should do so also, *Eyre* v. *Cox*, 24 W. R. 317.

PART THE FIRST.

STATUTES.

JUDGMENTS ACT, 1838.

1 & 2 VICT. CAP. 110.

[See ss. 14, 15, as to charging orders, note to Ord. XLVI., *post.*]

CUSTODY OF INFANTS ACT, 1839.

2 & 3 VICT. CAP. 54.

[See the new Act of 1873 (36 & 37 Vict. c. 12, *post.*)]

JUDGMENTS ACT, 1840.

3 & 4 VICT. CAP. 82.

[See s. 1; as to charging orders, note to Ord. XLVI., *post.*]

PERPETUATION OF TESTIMONY ACT, 1842.

5 & 6 VICT., CAP. 69.

An Act for perpetuating Testimony in certain Cases.

[30*th July*, 1842. 5 & 6 Vict. c. 69.

Bills in Chancery to perpetuate testimony may be filed by persons claiming honours, titles, &c., contingent on future

WHEREAS it is expedient to extend the means of perpetuating testimony in certain cases: Be it enacted, &c., that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real

5 & 6 Vict., c. 69.

events.

* Now the Chancery Division of the High Court (Judicature Act, 1873, s. 34, sub-s. 2).

or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled, from and after the passing of this Act, to file a bill in the High Court of Chancery,* to perpetuate any testimony (*a*) which may be material for establishing such claim or right, and that all laws, rules, and regulations not contrary to the provisions of this Act, now in force or in use in suits to perpetuate testimony, or respecting depositions taken in such suits, or the punishment of perjury committed in making such depositions, shall be in force and used and applied in all suits to be instituted under the authority of this Act, and in respect to depositions taken on such suits (*b*).

Order xxxvii., Rule 4. Examination *de bene esse.*

Lunatic's will.

Proceedings in foreign court.

Cons. Ord. ix.

(*a*) See now the general power to make any order for the examination of any persons in any cause or matter by Ord. XXXVII., r. 4 (pt. II.) *post.* If an action is actually pending concerning certain rights another action to perpetuate testimony in favour of such rights is improper; the witnesses must be examined *de bene esse* in the pending suit. *Earl Spencer* v. *Peek*, 3 L. R., Eq. 415. As to whether persons interested in a will made by a lunatic still alive before his lunacy can institute such an action to support the will against future litigation, see *Re Tayleur*, 6 L. R., Ch. 416. The court has jurisdiction to perpetuate testimony with a view to proceedings in foreign courts. *Morris* v. *Morris*, 2 Ph. 205.

(*b*) Consolidated Order IX., Rules 6, 7, provide as follows :—

Rule 6.

* Now "action constituted." (Ord. l. r. 1.)

Rule 6. *Witnesses shall not be examined* in perpetuam rei memoriam, *unless a bill* * *shall have been filed for the purpose.*

Admitting right to examine.

In a suit for the perpetuation of testimony a defendant need make no discovery beyond an admission of the plaintiff's title to examine the witnesses, *Ellice* v. *Roupell*, 32 Beav. 299, see *Lancaster* v. *Lancaster*, 6 Sim. 439; *Coveny* v. *Athill*, 1 Dick. 355. See *Brigtocke* v. *Roch*, 7 Jur. N. S. 63.

Want of prosecution.

If a suit to perpetuate testimony is not diligently prosecuted (*Wright* v. *Tatham*, 2 Sim. 459; *Beavan* v. *Carpenter*, 11 Sim. 22), the proper order is that the plaintiff do proceed within a certain time, or pay the defendant his costs (*ibid.*; and see *Barham* v. *Longman*, 2 Sim. 460.)

Cons. Ord. ix.

Rule 7. Not to be set down for hearing.

Rule 7. *No suit to perpetuate the testimony of witnesses shall be set down for hearing* (*9th Nov.* 1670) (*c*).

(*c*) See *Ellice* v. *Roupell*, 32 Beav. 308, and cases there cited, and *Vaughan* v. *Fitzgerald*, 1 Sch. and Lefroy, 316.

Costs of defendant.

When the witnesses have been examined there is an end of the cause (*Morrison* v. *Arnold*, 19 Ves. 670); and the defendant upon an allegation that he did not examine any witnesses, may obtain an order of course for his costs (*Foulds* v. *Midgeley*, 1 V. & B. 138); but if he examines witnesses himself he is not entitled to any costs, *Shrine* v. *Powell*, 15 Sim. 81, Morgan & Davey, 149. Where the defendant obtains the usual order for his costs, and such order recites that the testimony of witnesses has been taken, the

examination must be regarded as completely taken, and cannot be excluded because there was no sufficient cross-examination, *Watkins* v. *Atchison*, 10 Hare, App. xlvi. 5 & 6 Vict., c. 69.

Unless the witnesses are incapacitated from travelling, their depositions taken in a suit instituted *in perpetuam rei memoriam* cannot be read, *Morrison* v. *Arnold*, 19 Ves. 670; and see *Watkins* v. *Atchison*, 10 Hare, App. lxvi. Use of depositions.

The publication of the depositions will not prejudice the question whether they are evidence or not against persons who were not parties to the suit. *Vane* v. *Vane*, 24 W. R. 453, 565.

Attorney-General to be party defendant in all such suits in which the Queen may have any estate or interest.

II. And be it further enacted, that in all suits which may be so instituted under the authority of this Act, touching any honour, title, dignity, or office, or any other matter or thing, in which her Majesty, her heirs, or successors, may have any estate or interest, it shall be lawful to make the Attorney-General for the time being a party defendant thereto: and that in all proceedings in which the depositions taken in any such suit in which the Attorney-General for the time being was so made a defendant may be offered in evidence, such depositions may be admissible notwithstanding any objection to such depositions upon the ground that her Majesty, her heirs or successors, were not parties to the suit in which such depositions were taken.

ATTORNIES AND SOLICITORS ACT, 1843.

6 & 7 Vict. c. 73, ss. 37-43

6 & 7 VICT., CAP. 73, ss. 37-43.

An Act for consolidating and amending several of the Laws relating to Attornies and Solicitors practising in England and Wales.*

[22*nd August*, 1843.

* Now "Solicitors of the Supreme Court" (Judicature Act, 1873, s. 87,) and see Judicature Act, 1875, s. 14, *post*, as to power of adapting enactments to Solicitors of Supreme Court.

XXXVII. And be it enacted, that from and after the passing of this Act no attorney or solicitor (*a*), nor any executor, administrator, or assignee (*b*) of any attorney or solicitor, shall commence or maintain any action or suit (*c*) for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor (*d*), until the expiration of one month (*e*) after such

6 & 7 Vict. c. 73, ss. 37-43.

Attornies to deliver bills, and not to commence action for fees till one month after delivery.

attorney or solicitor, or executor, administrator, or assignee of such attorney, or solicitor, shall have delivered (*f*) unto the party to be charged therewith, or sent by the post to or left (*g*) for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill (*h*) of such fees, charges, and disbursements, and which bill shall either be subscribed (*i*) with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill; and upon the application of the party chargeable (*k*) by such bill within such month it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of Chancery*, or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of Law or Equity (*l*) for the Lord High Chancellor or the Master of the Rolls (*l*), and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham (*l*), or any judge of either of them, and they are hereby respectively required to refer (*m*) such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon to be taxed and settled by the proper officer of the court in which such reference shall be made without any money being brought into court; and the Court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the

Reference of bills, whether relating to business transacted in Court or not, for taxation.

* Now "the Chancery Division of the High Court (Judicature Act, 1873, s. 34, (2)).

Taxation after one month.

attorney or solicitor, whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the Court or judge making such reference shall think proper (*n*); and such Court or judge may restrain such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper (*o*): Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action (*p*) for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances (*q*), to be proved to the satisfaction of the Court or judge to whom the application for such reference shall be made; and upon every such reference, if either the attorney or solicitor, or executor, administrator, or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice (*r*) shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*; and in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be

6 & 7 Vict. c. 73, ss. 37-43.

Taxation after verdict;

or after twelve months, under special circumstances.

Payment of costs of taxation.

6 & 7 Vict. c. 73, ss. 37-43.

less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such application or so attending, shall pay such costs (*s*); and every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made to tax such costs of such reference to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference if payable: Provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or judge shall be at liberty to make thereupon any such order as such Court or judge may think right respecting the payment of the costs of such taxation: Provided also, that where such reference as aforesaid shall be made when the same is not authorised to be made except under special circumstances, as hereinbefore provided, then the said Court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference: Provided also, that it shall be lawful for the said respective Courts and judges, in the same cases in which they are respectively authorised to refer a bill which has been so as aforesaid delivered, sent or left, to make such order for the delivery (*t*) by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery (*t*) up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such Courts or judges respectively, where any such business had been transacted in the Court in which such order was made: Provided also, that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with this Act, to prove the contents of the bill he may have delivered, sent,

Courts may order attorney or solicitor to deliver his bill, and to deliver up deeds, &c.

Evidence of delivery of bill.

or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a *bonâ fide* compliance with this Act: Provided also, that it shall be lawful for any judge of the Superior Courts of Law or Equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England.

6 & 7 Vict. c. 73, ss. 37-43.

Power to judge to authorise action before expiration of month.

(*a*) As to the general jurisdiction over solicitors, see *Cowdell* v. *Neale*, 1 C. B. N. S. 332; *Ex parte Lord Cawdross*, 5 M. & W. 545; *Ex parte Arrowsmith*, 13 Ves. 125; *Re Forsyth*, 34 Beav. 140; on appeal, 2 D. J. S. 509, 13 W. R. 932; Judicature Acts, 1873, s. 87, and 1875, s. 14.

General jurisdiction over solicitors.

The Act should be construed liberally for the client (*Engleheart* v. *Moore*, 15 M. & W. 548; *Maddeford* v. *Austwick*, 3 M. & Cr. 423; *Williams* v. *Griffiths*, 10 M. & W. 125).

The summary jurisdiction has been held not to exclude the right of a client to file a bill against his solicitor for an account, *Morgan* v. *Higgins*, 5 Jur. N. S. 236; *Lyddon* v. *Moss*, 4 De Gex. & J. 104; *O'Brien* v. *Lewis*, 9 Jur. N. S. 321; or to enforce an agreement for delivery by petition, *Re Bailey*, 34 Beav. 392.

Sections retrospective.

(*b*) An assignee in bankruptcy was within the Act, *Re Walton*, 4 K. & J. 78.

(*c*) As to pleading non-delivery, see *Lane* v. *Glenny*, 7 Ad. & Ell. 33; *Hitchins* v. *Tate*, 7 C. B. 873; *Flower* v. *Newton*, 11 Jur. 875.

Non-delivery.

A solicitor may set off a bill before delivery, *Lester* v. *Lazarus*, 2 C. M. & R. 665; *Brown* v. *Tibbits*, 31 L. J., C. P. 406; or prove in bankruptcy, *Ex parte Prideaux*, 1 Gl. & Jam. 28; *Ex parte Steele*, 16 Ves. 166; or sue on a promissory note or other *collateral* (see page 10, *infra*) agreement, *Jeffryes* v. *Evans*, 14 M. & W. 210; *Re Moss*, 17 Beav. 346; *Thomas* v. *Cross*, 13 W. R. 166; in which case *Waugh* v. *Waddell*, 16 Beav. 521 (where it was held that pending a reference for taxation a solicitor could not by suit enforce his lien), is commented on.

Remedies of attorney.

After taxation, an action by the solicitor on his bill is a contempt, *Re Campbell*, 3 D. M. G. 585.

(*d*) These words only include business done in the character of solicitor, see note (*r*), *infra*, p. 11.

"Business."

(*e*) A calendar month is meant (s. 48 of the Act) *Ryalls* v. *Reg.*, 12 Jur. 458). It is to be calculated exclusively of the days on which the bill is delivered and the action brought (*Blunt* v. *Heslop*, 8 Ad. & Ell. 577).

"Month."

(*f*) As to what constitutes delivery, see *Eggington* v. *Cambeledge*, 11 Jur. 932; *Welsh* v. *Silwell*, 11 Jur. 571; *Blandy* v. *De Burgh*, 6 C. B. 623; *Dunn* v. *Hales*, 1 F. & F. 174; *Phipps* v. *Daubney*, 16 Q. B. 514; *Gridley* v. *Austen*, 16 Q. B. 504; *Spyer* v. *Bernard*, 8 L. T. N. S. 396; *Flower* v. *Newton*, 11 Jur. 875; and in the case of a public officer, see *Champ* v. *Stokes*,

What is "delivery."

6 & 7 Vict. c. 73, ss. 37-43.

6 H. & N. 633 ; and in that of the committee of a public company, *Edwards* v. *Lawless*, 5 Rly. Ca. 357 ; *Mant* v. *Smith*, 4 H. & N. Exch. 324 ; *Blandy* v. *De Burgh*, *Phipps* v. *Daubney*, *ubi sup.* Delivery to a duly authorised agent of the client is sufficient (*Re Bush*, 8 Beav. 66), or, *semble*, to his servant (*M'Gregor* v. *Keiley*, 3 Exch. 794). But a delivery to his solicitor is not enough, nor a friend or relation (*Gridley* v. *Austen*, 16 Q. B. 504, 511 ; *Re Abbott*, 4 L. T. N. S. 576). It may be sent by post (*Roberts* v. *Lucas*, 11 Exch. 41), and in such a case it is enough if the envelope and a signed letter accompanying it be addressed to the party chargeable (*ibid.*, and *Taylor* v. *Hodgson*, 3 Dowl. & Low. 115 ; and see *Manning* v. *Glyn*, Jones, Ir. Exch. Rep. 513). When the action was brought against the executors of the client, a delivery to the client himself in his life was held enough (*Reynolds* v. *Caswell*, 4 Taunt. 193, under the 2 Geo. 2, c. 23 ; see, too, *Tate* v. *Hitchins*, 7 C. B. 875). Where clients were liable on a joint contract, delivery of the bill to one of them was held sufficient (*Mant* v. *Smith*, *supra*). As to the mode of enforcing the order, see note (*t*), *infra*.

"Sent or left."

(*g*) The bill must be *left*, not merely shown, *Phipps* v. *Daubney*, 16 Q. B. 514 ; *Crowder* v. *Shee*, 1 Camp. 437.

Form of bill of costs.

(*h*) The bill, or some accompanying document (*Taylor* v. *Hodgson*, 3 Dowl. & Low. 115 ; *Lucas* v. *Roberts*, 11 Exch. 41), must specify the persons to be charged (*Gridley* v. *Austen*, 16 Q. B. 504 ; *Champ* v. *Stokes*, 6 H. & N. 683), the Court in which the business was done (*Lewis* v. *Primrose*, 6 Q. B. 265 ; *Dimes* v. *Wright*, 8 C. B. 831), the name of the cause (*Keene* v. *Ward*, 13 Q. B. 515), and the particular items charged for (*Drew* v. *Clifford*, 2 Car. & P. 69 ; *Re Smith*, 4 Beav. 309 ; *Philby* v. *Hazle*, 8 C. B. N. S. 647 ; *Re Pender*, 10 Beav. 390 ; *Re Tilleard*, 32 Beav. 476 ; *Pilgrim* v. *Hirschfield*, 12 W. R. 51 ; *Wilkinson* v. *Smart*, 24 W. R. 42) ; and as to specifying the number of folios in deeds, see *Re Foster*, 2 D. F. J. 105.

As a general rule, it is sufficient if the bill gives such information as will enable the client to obtain advice as to the taxation (*Haigh* v. *Ousey*, 7 Ell. & Bl. 578 ; *Cook* v. *Gillard*, 1 Ell. & Bl. 26 ; *Frowd* v. *Stillard*, 4 C. & P. 51 ; *Sargent* v. *Gannon*, 7. C. B. 742) ; and it need not be drawn in the technical form of a debtor and creditor account, (*Holmes* v. *Magrath*, 5 Ir. Law Rep. 376).

Unsigned bill.

(*i*) An unsigned bill accompanied by a signed letter referring to the bills is sufficient (*Re Bush*, 8 Beav. 66). An unsigned bill of costs may be

Client may waive irregularity.

referred to taxation by the party chargeable if he chooses to waive the irregularity (*Re Pender*, 8 Beav. 299 ; on appeal, 2 Phil. 69 ; *Re Gedye*, 14 Beav. 56 ; *Re Foster*, 2 D. F. J. 114) ; but he is not bound to do so (*Billing* v. *Coppock*, 1 Exch. 14).

Who, as party chargeable, may apply for taxation.

(*k*) A married woman having separate estate, which she has by agreement made liable (*Waugh* v. *Waddell*, 16 Beav. 521 ; and see *Re Pugh*, 17 Beav. 336, and *Murray* v. *Barlee*, 3 M. & K. 209) ; the next friend of an infant (*Re Fluker*, 20 Beav. 143) ; the executors (*Jefferson* v. *Warrington*, 7 M. & W. 137), or assignees in bankruptcy (*Clarkson* v. *Barber*, 7 Dowl. 87), of the party originally liable, are parties chargeable within the Act ; but an insolvent is not (*Re Halsall*, 11 Beav. 163) ; nor an outlaw (*Re Maunder*, 6 Q. B. 867). A party in contempt is not incapacitated from applying (*Newton* v. *Ricketts*, 11 Beav. 67). A married woman should apply by her

Persons jointly chargeable.

next friend (*Re Waugh*, 15 Beav. 508). Where several persons are jointly chargeable, they should concur in the application (*Re Lewin*, 16 Beav. 608 ; *Ex parte Mobbs*, 8 Beav. 499) ; and an order obtained by one of them alone on an allegation that he alone employed the solicitor, will be discharged as irregular (*ibid.*). But it seems that if one of the parties so liable refuses to concur, the order may be obtained by the other (*Lockhart* v. *Hardy*, 4 Beav. 224 ; *Re Hair*, 10 Beav. 187). In *Ex parte Ford*, 23 L. J. Ch. 515, taxation was ordered on the application of one party, the retainer having been *separate*. See, too, *Re Stephen*, 2 Ph. 562. As to the cases in which security for costs will be required from the person applying, see *Re Pasmore*, 1 Beav. 94 ; *Re Dolman*, 11 Jur. 1095 ; *Ex parte Foley*, 11 Beav. 456 ; *Murrow* v. *Wilson*, 12 Beav. 497 ; *Re Waugh*, 15 Beav. 508.

Security for costs of taxation.

Overseers of the poor are bound to have an attorney's bill taxed before they pay it; and in case of neglect the payment may be disallowed (*Re Overseers of Napton, Warwickshire*, 27 L. T. 124). The client obtaining the order for taxation has to undertake to pay what shall be found due, and may have to pay charges which could not have been actively recovered by the solicitor, see *Re Jones*, L. R. 9 Eq. 63; *Re Elmslie & Co., ibid.*, 72. 6 & 7 Vict. c. 73, ss. 37-43. Who *must* apply.

(*l*) The following descriptions of charges have been held to be for business done in no Court and therefore taxable in Chancery. *Where* bills are taxable.

Charges for Parliamentary business (the equitable jurisdiction not being taken away by the House of Commons Costs Acts (10 & 11 Vict. c. 69, or 12 & 13 Vict. c. 78), *Re Strother*, 3 K. & J. 518; *Re Sudlow*, 11 Beav. 400; *Re Osborne*, 25 Beav. 353; for obtaining an order at chambers for leave to enter up satisfaction on a bond given to the Crown (*Re Gaitskell*, 1 Ph. 576. See *Ex parte Fleetwood*, 4 Man. & Gr. 640; *Winter* v. *Paine*, 6 D. & E. 645); for obtaining a married woman's acknowledgment (*Re Branson*, 4 Scott, 539); for business done in the court of a revising barrister (*Re Andrews*, 17 Beav. 510); for taking preliminary steps to proceedings in Court (*Wilson* v. *Gutteridge*, 3 B. & C. 157; *Weld* v. *Crawford*, 2 Stark. 538; *Re Barker*, 6 Sim. 476; *Collins* v. *Nicholson*, 2 Taunt. 321); and for other incidental business (see *Brooks* v. *Brooks*, 6 L. J. C. P. 243; *Sansom* v. *Boon*, 4 Camph. 68), where a solicitor was appointed returning officer for the election of a school board and sent in his bill of expenses in the usual form of a bill of costs, it was held the bill could be taxed, *Re Jones*, L. R. 13 Eq. 336. Business taxable in Chancery,

Where the solicitor retained his bill and refused to produce it, it was assumed that the court had jurisdiction, *Re Loughborough*, 23 Beav. 439.

The fact that an action was pending for the amount of the bill was held not to give the common law judges jurisdiction to tax the bill, *Cowdell* v. *Neale*, 1 C. B. N. S. 332; *Sayer* v. *Bush*, 1 Man. & Gr. 1027. though action pending.

Though, *in general*, the application need not be to that branch of the Court which heard the suit (*Robins* v. *Mills*, 1 Beav. 227; *Re Elmslie*, 12 Beav. 538; *Bingham* v. *Hallam*, 9 L. J. Ch. 104), it is otherwise when the merits of the case enter into the question, *Webb* v. *Grace*, 12 Beav. 489. Taxation in which branch of the Court.

A solicitor may have his agent's bill taxed under the Statute, *Toghill* v. *Grant*, 2 Beav. 261; *Re Smith*, 4 Beav. 309, and see note (*r*), p. 11 as to the items to be included. Solicitor's agent's bill.

(*m*) As to the mode of applying for the common order, see note (*a*), *supra*, and for forms of order to refer bills for taxation, see Seton, 828, 830. In the absence of special circumstances the order may be obtained *ex parte*, *and as of course* before twelve months have elapsed from delivery, *Holland* v. *Gwynne*, 8 Beav. 124; Seton, 835; Daniell, 1711. The costs of a special application may be refused where an *ex parte* application would have been sufficient, *Re Bignold*, 9 Beav. 269; see *Re Taylor*, 15 Beav. 145; *Re Atkinson*, 26 Beav. 151; *Re Adamson*, 18 Beav. 460; *Re Lett*, 31 Beav. 488; *Re Cattlin*, 8 Beav. 121; *Re Bracey*, *ibid.* 338. Order before twelve months *ex parte* and *of course*.

If the taxation abates by death of solicitor or client, or both, an order to revive the reference as between the respective representatives may be obtained, *Re Whalley*, 20 Beav. 576, and where the solicitor died the order to revive was *ex parte*, *Re Nicholson*, 29 Beav. 665; *Re Waugh*, *ibid.*, 666; and see *Robertson* v. *Southgate*, 7 Hare, 109. Revivor of reference.

An order of course, though right on the merits, is dismissed if obtained in a case where a special application was necessary, *Harris* v. *Start*, 4 M. & C. 261; *Grove* v. *Sanson*, 1 Beav. 297; *Gregg* v. *Taylor*, 1 Beav. 123. Special application

An order of course was held not irregular where the solicitor had without the client's knowledge commenced an action for his costs, *Re Farington*, 33 Beav. 346 (though after final judgment given in an action, the Court has no jurisdiction, note (*p*), *infra*). So where the solicitor had set up his bill in defence to an action, but the bill had not been gone into, this was held to be no reason for requiring a special application in Chancery for taxation, *Re David*, 30 Beav. 278.

A special application *is* necessary under the following circumstances— *is* necessary,

(1) If the application is to tax only part of the bill claimed by the solicitor (*Re Law*, 21 Beav. 481; *Re Byrch*, 8 Beav. 124; *Re Dalby*, *ibid.* 469; *Re Wardell*, 22 Beav. 634; *Stokes* v. *Tramper*, 2 K. & J. 232; but see *Re Fluker*, (1) If part of a bill only is to be taxed.

6 & 7 Vict. c. 73, ss. 37-43.

20 Beav. 143 ; *Re Hinton*, 15 Beav. 192 ; *Re Yetts*, 33 Beav. 412), or the application is made by some only of several parties jointly liable, *Re Perkins*, 8 Beav. 241 ; *Re Ilderton*, 33 Beav. 201. *Secus*, where they are severally liable, *Re Hair*, 10 Beav. 187.

(2) Where retainer is disputed.

(2) Where the professional employment or retainer is disputed, *Re Eldridge*, 12 Beav. 387, *Re Thurgood*, 19 Beav. 541, and see *Gillow* v. *Rider*, 15 C. B. 729 ; but a special application need not be made because the client considers some of the proceedings to have been unnecessary—the taxing master will go into these questions, *Re Atkinson*, 26 Beav. 153.

(3) Where there is a special agreement.

(3) Where there is a special agreement, *Re Winterbotham*, 15 Beav. 80, *e.g.*, to give the solicitor a lien, *Re Moss*, 17 Beav. 59, and see *Re Ransom*, 18 Beav. 220 ; *Re Fisher*, 18 Beav. 183 ; *Ward* v. *Lawson*, 8 L. R. Ch. 65. A special agreement, respecting some part of the costs, unless it goes to the whole bill, is not held now to be necessarily a bar to a common order for taxation, though it was formerly considered to be so, *Re Eyre*, 10 Beav. 569 ; 2 Ph. 367 ; and see *Re Forsyth*, 34 Beav. 140 ; *Re Thompson*, 14 L. T. N. S. 6 ; but there must be no suppression of the fact of such an agreement, or the order will be discharged, *Re Ingle*, 21 Beav. 275 ; *Re Carven*, 8 Beav. 436 ; *Re Holland*, 19 Beav. 314. An agreement to charge a fixed sum in lieu of costs hereafter to be incurred was void, see *Re Newman*, 30 Beav. 196 ; *Pince* v. *Beattie*, 11 W. R. 979 ; *Philby* v. *Hazle*, 7 Jur. N. S. 125 ; but see as to an agreement to pay a solicitor a fixed salary, *Bush* v. *Martin*, 33 L. J. Ex. 17 ; *Galloway* v. *Corporation of London*, L. R. 4 Eq. 90. See the new Act as to agreements between solicitors and their clients, 33 & 34 Vict. c. 28, ss. 4–15, *infra* p 20.

Irregularity in order waved.

Any irregularity in obtaining the order may be waived by the solicitor, *Re Field*, 16 Beav. 593 ; *Re Wavell*, 22 Beav. 634 ; *Re Hair*, 11 Beav. 96 ; *Re Bevan*, 12 W. R. 196 ; *Re Bartrum*, *ibid.* 660.

For cases where a bill might have been filed, see *Re Forsyth*, 34 Beav. 140 ; *Ward* v. *Lawson*, 8 L. R. Ch. 65 ; *Rees* v. *Williams*, 10 L. R. Ex. 200.

Application after one month.

(*n*) This application may be made *ex parte*. See note (*m*). For forms of order under this clause, see *Re Bromley*, 7 Beav. 488, note ; *Re Becke*, 5 Beav. 406 ; *Re Field*, 16 Beav. 593.

(*o*) See note (*c*), *supra*.

Verdict at law a bar to taxation.

(*p*) See *Re Barnard*, 2 D. M. G. 359. But where judgment at law had gone against the client *by default*, but no writ of inquiry to assess the damages had been executed, such judgment was held not to be a final judgment so as to prevent taxation in equity, s.c. 16 Beav. 5.

After twelve months. Special circumstances.

(*q*) Special applications are now made by summons in chambers, Ord. 17 April, 1867, r. 1.

Twelve months after delivery, even an unsigned bill can only be taxed under special circumstances, *Re Gedye*, 14 Beav. 56, which may be matters appearing on the face of the bill, *Re Robinson*, L. R. 3 Ex. 4 ; so that to entitle a client to taxation after twelve months he must show either "pressure accompanied by some overcharge," or, "gross overcharge amounting to fraud," *Re Strother*, 3 K. & J. 528 ; *Re M'Kay*, 15 L. T. 101.

But as to taxation after twelve months in cases where there is an order to tax outside the Act, see *Ex parte Blair*, L. R. 5 Ch. 482 ; *Re Marseilles, &c., Coy.*, L. R. 11 Eq. 151 ; *De Bay* v. *Griffin*, L. R. 10 Ch. 291.

Pressure and overcharge.

As to what circumstances constitute such pressure or fraudulent overcharge, see the note to sect. 41, *infra*, on "application to tax after payment" on which applications the question more frequently arises, *Re Williams*, 15 Beav. 417.

Other grounds accounting for the delay.

The Court will require the delay to be accounted for : a dispute and correspondence as to alleged omissions in the bill were held to be a sufficient apology for the lateness of the application in *Re Bagshawe*, 2 De G. & Sm. 205, and see *Binn's Executors* v. *Hey*, 1 D. & L. 661 ; but the circumstance that the solicitor was suing at law for his fees was not a sufficient apology, *Bennett* v. *Hill*, 21 L. T. 101, and see note (*m*), *supra*. Where the relationship of solicitor and client continued until within a year before the application was made, and the last account had been delivered within the year it was held a material circumstance in accounting for the delay, *Re Cartwright*, L. R. 16 Eq. 469 ; *Re Nicholson*, 3 D. F. J. 93, 100 ; *Re F.*, 16 W. R. 740 ;

Last Account within the year.

but see *Re Elmslie & Co.*, L. R. 16 Eq. 326; but the solicitor's possession of the papers in the suit was not, *Re Gedye*, 14 Beav. 56, and see *Sayer* v. *Wagstaff*, 5 Beav. 415; *Re Pugh*, 32 Beav. 273, 1 D. J. S. 673. 6 & 7 Vict. c. 73, ss. 37-43.

So where a client has not had proper opportunity to examine the bill, taxation after twelve months has been allowed, *Re Williams*, 15 Beav. 417 (where the bill was delivered just as the client was going abroad); but the client must show that there has been no undue laches or acquiescence on his part, that the special circumstances are such as he could not with reason have availed himself of sooner, *Re Barnard*, 2 D. M. G. 359; but see *Re Strother*, 3 K. & J. 518. For cases where lapse of time and laches has been a bar to taxation, see *Re Vines*, 2 D. M. G. 842; *Blagrave* v. *Routh*, 8 D. M. G. 620 (where the application was by bill). And see note (*f*), p. 18, *post*. Where client has not had opportunity to examine. Laches and acquiescence.

In ordering taxation after twelve months the Court will, if necessary, restrict the taxation within certain limits, *Re Nicholson*, 3 D. F. J. 93. Compare *Allen* v. *Jarvis*, L. R. 4 Ch. 616. Limits of taxation.

(*r*) It is important with reference to the costs of taxation to consider what items included by the solicitor in his bill will be allowed him on a reference for taxation. Costs of taxation.

Only those payments are allowed on taxation which are made by the solicitor in his professional capacity; see *Re Page*, 32 Beav. 487, and the certificate of the taxing-masters in *Re Remnant*, 11 Beav. 603; and for the taxing-master's discretion as to the amount, see *Re Page*, 32 Beav. 487. Other disbursements should be included in a separate account; but see *Waring* v. *Williams*, 2 Beav. 1. Payments made to counsel for business have been held professional disbursements, *Franklin* v. *Featherstonhaugh*, 1 Ad. & Ell. 478, even when the client appropriated a special sum for such payment, leaving the solicitor no discretion, *Re Bedson*, 9 Beav. 5; but see *Re Metcalfe*, 30 Beav. 406; Daniell, 1724. Cash payments made by the solicitor in proceedings where he was not professionally concerned are not allowed to be included, *Hemmings* v. *Wilton*, 4 C. & P. 318; *Prothero* v. *Thomas*, 6 Taunt. 196; *Re Lees*, 5 Beav. 410; and see *Latham* v. *Hyde*, 1 Cromp. & Mees. 128; *Fearne* v. *Wilson*, 6 B. & Cr. 86. Thus the fees of a solicitor acting as steward to a manor, are not professional disbursements, *Allen* v. *Aldridge*, 5 Beav. 401; but business done by a solicitor "retained to act as electioneering agent, and to advise and assist the committee," may be included, *Re Osborne*, 25 Beav. 353. Compare *Re Oliver*, 15 W. R. 331. Items to be included. Disbursements.

A solicitor may apply for taxation of his agent's bill of costs (see p. 9, *ante*), and though agency business includes many transactions, it may be taxed in one bill, generally on the terms of the applicant paying a sum of money into Court, *Billing* v. *Coppock*, 1 Exch. 14; *Smith* v. *Dimes*, 4 Exch. 32; *Re Smith*, 9 Beav. 342; *Jones* v. *Roberts*, 8 Sim. 397; *Harvey* v. *Mayhew*, 2 W. R. 128; and see *Deere* v. *Robinson*, 7 Hare, 283, Seton, 1716. Taxation of agency bills.

An order directing costs of a suit to be taxed warrants taxation up to the date of the taxing-master's report, *Quarrell* v. *Beckford*, 1 Mad. 285, and see 2 Daniell, 1084. Items to date of report.

Where a solicitor has been retained for a particular business, his bill of costs for carrying it through, constitutes one bill, *Stokes* v. *Trumper*, 2 K. & J. 232, and see *Re Peach*, 2 D. & L. 33. What constitutes one bill.

After the bill has been *referred* for taxation under this statute (see *Davis* v. *Earl of Dysart*, 21 Beav. 124, 8 D. M. G. 33), no alteration can be made in it (*Hays* v. *Trotter*, 5 B. & Ad. 1106; *Re Wells*, 8 Beav. 416; *Re Catlin*, 18 Beav. 519), except by consent, or on a special application for leave to amend, *Re Andrews*, 17 Beav. 510, 514. Thus leave was given to amend by inserting omitted items, and increasing undercharges (see, however, *Re Tilleard*, 32 Beav. 476); but not to decrease overcharges, *Re Whalley*, 20 Beav. 576; nor to withdraw items improperly inserted, *Re Carven*, 8 Beav. 436; *Re Jones*, *ibid.* 479; *Re Blakesly*, 32 Beav. 379. No alteration after *reference* to master, except by leave of Court. Insertion of additional items.

So a solicitor whose bill was referred for taxation, was not allowed to have a previous bill against the same client, which he had retained, included in the taxation, for the purpose of saving costs of taxation, *Re Gregg*, 30

6 & 7 Vict. c. 73, ss. 37-43.

Beav. 259 ; but it has been doubted whether under an order for a general taxation, a solicitor can have items included which have been taxed and paid under a previous particular taxation, *Tarbuck* v. *Tarbuck*, 4 Beav. 149 ; and see *Ex parte Quilter*, 4 De G. & Sm. 183.

Alteration after *delivery*.

Where a solicitor has *delivered* his bill, he is bound by it to this extent, that he cannot substitute a second bill for it, even before notice of an order to tax is served on him, without paying all the costs incurred by the client up to the date of the obtaining such order, *Re Chambers*, 34 Beav. 177 ; and unless there are special reasons he must abide by the bill he first delivered, *Re Heather*, L. R. 5 Ch. 694.

Rule as to one sixth.

(*s*) The rule as to one-sixth is imperative in an ordinary reference to taxation, *Re Woollett*, 15 M. & W. 504. Where the reference is special that rule does not apply, and the costs of the reference are in the discretion of the judge ; and see *Dickins* v. *Woolcot*, 8 B. & N. 589 ; *Toghill* v. *Grant*, 6 Beav. 348 ; 1 Chitty's Statutes, 157, note (*f*), for the rule as to costs of taxation independently of the act.

Where in a suit against a solicitor for a general account, more than one-sixth was taken off in the suit outside the taxation, but less than one-sixth on the taxation, the Court allowed the solicitor the costs of the taxation (*May* v. *Biggenden*, 24 Beav. 207). Where taxation was awarded pending an action for the costs, and more than one-sixth was taken off, the Court ordered the costs of the reference to be paid by the solicitor, and the costs of the action by the client (*Re Hair*, 11 Beav. 96). See *contrà*, before the Act, *Toghill* v. *Grant*, 6 Beav. 348. As to the costs of taxation of several bills, see *Beardsall* v. *Cheetham*, 31 L. T. 115 ; *Ex parte Barrett*, 3 D. & Ch. 731.

Where solicitor is bankrupt.

When more than one-sixth is taken off the bill of an insolvent or bankrupt solicitor, see as to the costs of the taxation *Re Peers*, 21 Beav. 520 ; *Re Peile*, 25 Beav. 561 ; *Re Cole*, 2 Sim. & St. 463 ; *Whalley* v. *Williamson*, 6 Man. & Gr. 269.

Calculation of one-sixth.

Where the master disallows some items and adds others, the bill is to be considered as increased by the items allowed and then reduced by the sums disallowed (*Re Hartley*, 2 Jur. N. S. 448 ; and see *Reg.* v. *Eastwood*, 5 Ell. & Bl. 285 ; *Re Clark*, 13 Beav. 173 ; 1 D. M. G. 43 ; and in bankruptcy, *Ex parte Watts*, 2 Mont. & A. 621 ; *Ex parte Christy*, 3 M. & A. 108) ; and as to taking into account items struck out as chargeable against another person, see *Re Clark*, l. c., and the taxing-master's certificate in that case, 13 Beav. 181—3 ; *Re Colquhoun, Ex parte Ford*, 1 Sm. & G. app. 1 ; s. c. on appeal, 5 D. M. G. 35 ; from which it seems that such items must be reckoned in as against the solicitor.

Where client pays costs.

Where a bill was ordered to be taxed (questions as to liability being reserved) and less than a sixth was struck off, it was held that, whatever might be the result of the question reserved, the client must pay the costs of taxation (*Re Shaw*, 20 L. J. Q. B. 280).

Delivery of bill how enforced.

(*t*) Orders under this section for delivery of solicitor's bill or papers may be enforced by attachment, *Ex parte Belton*, 25 Beav. 368 ; *Re Bowen*, 11 W. R. 607. See Ord. XLII., r. 5 (pt. II.), *post*.

When the order was disobeyed, and the solicitor swore that he had no papers from which he could make out his bill, the Court refused to commit him for non-delivery, *Re Ker*, 12 Beav. 390. No action lay at law for disobedience to the order, *Dent* v. *Basham*, 9 Exch. 469. A solicitor had further time given him to make out his bill on the costs of his motion, *Re Dendy*, 21 Beav. 565. As to enforcing payment of costs found due, see note (*i*) to sect. 43, *post*.

Delivery of papers to client.

The Court will, before the completion of a taxation, order the delivery up of papers by a solicitor to his client, either upon payment into Court of the amount claimed, or on security being given for payment, *Re Jewitt*, 34 Beav. 22 ; or in case it appears from the solicitor's own account that a balance is due from him to his client, *Re Bevan*, 33 Beav. 439 ; and as to inserting a direction for delivery up of papers in the common order for taxation, see *Re Pender*, 8 Beav. 299 ; *Re Teague*, 11 Beav. 318.

As to the solicitor's right to enforce his lien for costs by retaining

papers, see *Re Mosely*, 15 W. R. 975, and *post*, p. 22. If the solicitor discharges himself, *pendente lite*, an order may be obtained for delivery up of papers to the new solicitor, without prejudice to the lien, the new solicitor undertaking to return them within ten days after the hearing, *Heslop* v. *Metcalfe*, 3 M. & C. 183; *Wilson* v. *Emmet*, 19 Beav. 233; *Re Williams*, 28 Beav. 465; and see *Cane* v. *Martin*, 2 Beav. 584. 6 & 7 Vict. c. 73, ss. 37-43.

As to the order for delivery of papers, see *Re Minter*, 19 Beav. 33; *Re Christmas*, *ibid.* 519; *Re Dendy*, 21 Beav. 565, and Ord. XLII., r. 5 (pt. II.), *post*. Four-day order.

XXXVIII. And be it enacted, that where any person (*v*) not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid; it shall be lawful for such person, his executor, administrator, or assignee, to make such application (*w*) for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: Provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorised to be made except under special circumstances (*x*), it shall be lawful for the Court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application (*y*). Bills may be taxed upon the application of third parties liable to pay.

(*v*) Under this section, the bill of a mortgagee's solicitor for business done in regard to the mortgaged estate, may be taxed by the mortgagor (*Re Carew*, 8 Beav. 150; *Re Lees*, 5 Beav. 410; *Re Wells*, 8 Beav. 416), or by subsequent incumbrancers (*Re Taylor*, 18 Beav. 165; *Re Jessop*, 32 Beav. 406). The official manager of a wound-up company may obtain an order under this section, *Re Vardy*, 20 L. J. Ch. 325, and perhaps a trustee in bankruptcy, *Re Elmslie*, L. R. 9 Eq. 72. Who entitled to apply under this section: official manager;

A mere volunteer, under no previous liability, undertaking to pay a solicitor's bill, does not acquire a right to tax it, *Re Bæcke*, 5 Beav. 406. See before the Act, *Langford* v. *Nott*, 1 Jac. & W. 291; and see *Re Barber*, 14 M. & W. 720, where persons liable to highway rates were held not entitled to tax the bill of an attorney employed by the surveyor of highways, on the ground that they were only remotely interested in the payment of the attorney. But where a suit was compromised, plaintiff agreeing to pay not persons voluntarily undertaking to pay.

6 & 7 Vict. c. 73, ss. 37-43.

defendant's costs, plaintiff was held entitled to an order of course for taxation of the bill, *Re Hartley*, 30 Beav. 620. Compare *Vincent* v. *Vanner*, 1 M. & K. 212.

Not unless the client could have taxed.

Taxation on what principle.

Taxation can only be applied for under this and the next section in cases where the immediate client ought have applied, *e.g.*, after payment, special circumstances must be shown, *Re Stephen*, 2 Phil. 562; *Re Dickson*, 8 D. M. G. 655. The taxation at the instance of the third party must be as between the solicitor and the immediate client, not as between the solicitor and the third party, *Re Wells*, 8 Beav. 413; *Re Jones*, *ibid.* 479; *Re Fyson*, 9 Beav. 117; *Re Barrow*, 17 Beav. 547; *Re Taylor*, 18 Beav. 165, where the third party (a mortgagor) was held entitled to the benefit of a private arrangement between the mortgagee and his solicitor, but see *Gordon* v. *Dalzell*, 15 Beav. 351; *Raymond* v. *Leheman*, 34 Beav. 584; *Re Newman*, L. R. 2 Ch. 707, where it was held that an agreement between the immediate client and the third party paying was not to affect the mode of taxation.

If the bill has been paid without fraud or pressure by the immediate client, *Re Neate*, 10 Beav. 181; *Re Rees*, 12 Beav. 256; *Re Dickson*, 8 D. M. G. 655, or has been paid twelve months (*post*, p. 18), or if there is an agreement excluding taxation, the third party cannot tax it, under this section; but if an excessive amount has been paid, he must bring an action against the client who paid the bill, to reduce his liability, *Re Downes*, 5 Beav. 425; *Re Massey*, 34 Beav. 463 (where *Re Jessop*, 32 Beav. 406; *Re Baker*, 32 Beav. 526; and *Re Abbott*, 4 L. T. N. S. 576, were not followed). See, too, *Re Forsyth*, 34 Beav. 140, affirmed 13 W. R. 923; *Re Gold*, 19 W. R. 313.

The rule that the taxation under this section is as between solicitor and immediate client is subject to the limitation that a solicitor cannot charge as against a *cestui que trust*, anything not necessary for the administration though directed by the trustees, but must look for payment of such charges to the trustee, *Re Brown*, L. R. 4 Eq. 464.

Order, when of course.

(*w*) The proceedings under this section may be by order of course (*Re Straford*, 16 Beav. 27; comp. *Re Moss*, 17 Beav. 340; *Re Bracey*, 8 Beav. 338; *Re Bignold*, 9 Beav. 269) in cases where a like proceeding might have been adopted by the immediate client, see note (*m*), p. 9, *Re Hartley*, 30 Beav. 620.

(*x*) See *ante*, note (*m*), and *post*, note (*e*), p. 16.

(*y*) See *Re Vardy*, 20 L. J. Ch. 325, as to the force of these words.

Lord Chancellor may direct taxation of bills chargeable on executors, &c.

XXXIX. And be it enacted, that it shall be lawful in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the Lord High Chancellor or the Master of the Rolls, if in his discretion he shall think fit (*z*) upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same, and such attorney's or solicitor's, or executor's, administrator's, or assignee's demand thereupon, to be taxed and settled by the proper officer of the High Court of Chancery, with such directions and subject to such conditions as such judge shall think fit, and to make such order as such judge shall think fit for the payment of what may be found due, and of the costs of such reference to or by such attorney, or solicitor,

or the executor, administrator, or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases, and in exercising such discretion as aforesaid, the said judge may take into consideration the extent and nature of the interest of the party making the application: Provided always, that where any money shall be so directed to be paid by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, it shall be lawful for such judge, if he should think fit, to order the same, or any part thereof, to be paid to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect to such bill, he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, had.

6 & 7 Vict. c. 73, ss. 37-43.

(z) For form of order, see *Re Dawson*, 28 Beav. 605. The proceedings under this section must be by special application (*Re Straford*, 16 Beav. 27); *i.e.*, by summons in chambers (Order, 17 April, 1867, r. 1).

Application by *cestui que trust.*

Taxation of a bill may be ordered under this and the last section after payment or security given for the amount by the trustee or executor. *Re Dickson*, 8 D. M. G. 655, but in such case the *cestui que trust* seeking to tax must show overcharges amounting to fraud, *ibid.*, and see page 660 of the report; though Lord Romilly, M. R., seems to have held a different opinion, *Re Drake*, 22 Beav. 438; *Re Blackmore*, 13 Beav. 154; *Re Dawson*, 28 Beav. 605; see note (*v*), page 13, on taxation by third party.

After payment.

Overcharges.

For form of order where the trustee was dead, see *Re Hallett*, 21 Beav. 250, and *Allen* v. *Jarvis*, 4 L. R. Ch. 616, where the trustee was also solicitor, and had retained his bill.

XL. And be it enacted, that for the purpose of any such reference upon the application (*a*) of the person not being the party chargeable within the meaning of the provisions of this Act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such Court or judge to order any such attorney or solicitor, or the executor, administrator, or assignee of any such attorney or solicitor,

Copy of bill to be delivered to person making application for reference for taxation.

6 & 7 Vict. c. 73, ss. 37-43.

to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy: Provided always, that no bill which shall have been previously taxed and settled shall be again referred unless, under special circumstances, the Court or judge to whom such application is made shall think fit to direct a re-taxation thereof.

No re-taxation.

Delivery of bill to *cestui que trust.*

(*a*) For form of order under this section, see Seton, 848, and see *Re Blackmore*, 13 Beav. 154, 161.

Taxation of bill after payment.

XLI. And be it enacted, that the payment (*b*) of any such bill as aforesaid (*c*) shall in no case preclude the Court or judge to whom application shall be made from referring such bill for taxation (*d*) if the special circumstances of the case (*e*) shall in the opinion of such Court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment (*f*).

Security is equivalent to payment. Retainer by solicitor is not.

(*b*) The giving of security is for the purpose of this section equivalent to payment (*Ex parte Turner*, 5 D. M. G. 540; *Sayer* v. *Wagstaffe*, 5 Beav. 415; *Re Harper*, 10 Beav. 284; *Re Currie*, 9 Beav. 602; but see *Re Drake*, 22 Beav. 438; *Re Harries*, 13 M. & W. 3); but retainer by the solicitor without delivery of a bill is not (*Re Bignold*, 9 Beav. 270; *Re Steele*, 20 L. J. Ch. 562; *Re Street*, 10 L. R. Eq. 165). See, however, *Ex parte Hemming*, 28 L. T. 144; *Re Gregg*, 30 Beav. 259; *Ex parte Shackell*, 2 D. M. G. 842; *Allen* v. *Jarvis*, 4 L. R. Ch. 616.

Part payment on account is not such payment as to require a special application, *Re Woodard*, 18 W. R. 37.

(*c*) These words apply to all solicitor's bills, including bills sought to be taxed by third parties (*Re Downes*, 5 Beav. 425).

Form of order. Mode of application.

(*d*) For form of order for taxation after payment, see Seton, 843.

The application was formerly by petition served on the solicitor, and it was held that the petition should state when payment was made, *Re Mash*, 15 Beav. 83. It is now made by summons in chambers. Order Aug. 2, 1864, rule 1. As to the effect of delay in making the application, see "laches and acquiescence," *infra*, note (*f*).

"Special circumstances."

(*e*) A great variety of cases have been decided as to the meaning of the words "special circumstances." They have generally been held to signify either "pressure, accompanied by some overcharge," or "overcharges or errors so gross as to amount to fraud." It will be convenient to consider each ground under a separate head.

(1) Pressure *accompanied by some overcharge.*

(1) Cases of "pressure accompanied by some overcharge" generally occur where a client has been practically obliged to pay a bill of costs *without having an opportunity of inspecting and examining it*, either because—

Refusal to deliver up papers.

(*a*) The solicitor having deeds in his possession which he knew it was of importance to the client to obtain without delay, refused to deliver them up unless his bill was first paid; *Re Pugh*, 32 Beav. 173; 1 D. J. S. 673, and cases there cited, *Re Elmslie*, 12 Beav. 538; *Re Alcock*, 2 Coll. 92; *Re Lett*,

31 Beav. 488 (where the solicitor delivered two bills, one on a higher the other on a lower scale, and the client having paid the higher bill under pressure, the delivery of the lower one was held no defence to the order for taxation), *Re Phillpotts*, 18 Beav. 84; *Re Newman*, 2 L. R. Ch. 707 (where the defence was set up that the client had himself created the difficulty which made the deeds necessary to him); 6 & 7 Vict. c. 73, ss. 37-43.

(β) Or because the solicitor having securities of the client in his possession threatened to enforce them unless the bill was paid at once (*Re Rance*, 22 Beav. 177; *Re Kinneir*, 7 W. R. 175; *Re Foster*, 2 D. F. J. 105); Threats to enforce securities.

(γ) Or, generally, where the solicitor has taken undue advantage of the exigencies of the client's position, *Re Stephen*, 2 Ph. 562, cited *ante*, p. 14; *Nokes* v. *Warton*, 5 Beav. 448; see *Re Wyche*, 11 Beav. 209. Generally taking an advantage.

If the client has had an opportunity of examining and taxing the bill, these cases do not apply, and even a week was held sufficient opportunity in *Re Welchman*, 11 Beav. 319 (comp. *Re Mash*, 15 Beav. 83); a fortnight in *Re Neate*, 10 Beav. 181; three weeks in *Re Neate*, *ibid.* 57; and see *Re Drew*, *ibid.* 368; *Re Currie*, 9 Beav. 602; *Nokes* v. *Warton*, 5 Beav. 448; *Re Boyle*, 5 D. M. G. 540; *Re Browne*, 1 D. M. G. 322, where it was said that the pressure must have been of such a kind as to have rendered it impossible or difficult to have had the costs taxed before payment and in the ordinary course, and *Re Barrow*, 17 Beav. 547, where the M. R. said that the doctrine of pressure in cases of taxation after payment is not to be extended. Exception where client has had opportunity to examine.

In all such cases the Court will only direct taxation if there is at least a reasonable belief that if the bill be taxed, some of the charges will be disallowed (*Re Sladden*, 10 Beav. 488); therefore some items of overcharge ought to be pointed out, *Re Brady*, 15 W. R. 632; though not necessarily such as to amount to fraud, *Re Wells*, 8 Beav. 416; *Re Hubbard*, 15 Beav. 251; *Re Abbott*, 18 Beav. 393; *Re Towle*, 30 Beav. 170; *Re Newman*, 2 L. R. Ch. 707; and the absence of any affidavit or other proof as to items of overcharge will be a reason for dismissing the petition, *Ex parte Barton*, 4 D. M. G. 108; affirming s. c. 16 Beav. 585. Some overcharge should be proved.

So the fact that the bill was paid under protest is only material if connected with circumstances of pressure or overcharge, *Re Neate*, 10 Beav. 181-183, and where a bill is paid under protest, the particular items objected to should, if possible, be pointed out, *Re Davie*, 8 W. R. 15; see *Re Dearden*, 9 Exch. 210; *Re Bayley*, 18 Beav. 415. Payment under protest.

Payment for the purpose of staying proceedings in action is no bar to taxation, Ord. III. r. 7 (Part II. *post*). Payment in stay of proceedings.

(2) Where there is no pressure the Court will only order taxation after payment on proof of "overcharges amounting to fraud," *Re Strother*, 3 K. & J. 518; *Horlock* v. *Smith*, 2 M. & Cr. 495; *Re Dickson*, 8 D. M. G. 655. (2) Fraudulent overcharge (*without pressure*).

Some of the particular charges relied on, must be pointed out, *Re Browne*, 1 D. M. G. 322, 333; *Re Foster*, 2 D. F. J. 105; *Dunt* v. *Dunt*, 9 Beav. 146; *Re Towle*, 30 Beav. 170. But not all, *Re Dawson*, 28 Beav. 605.

Trifling items will be insufficient, *Re Drake*, 8 Beav. 123; *Re Thompson*, *ibid.* 237; *Re Bayley*, 18 Beav. 415.

And generally the onus is on the applicant to show that the charges under the special circumstances were fraudulent, see *Re Walsh*, 12 Beav. 490, *Re Towle*, 30 Beav. 170, where charges for eight attendances in one day were held not sufficient to open a paid bill, and *Re Boyle*, 5 D. M. G. 546, where 240 letters were written in one year, and *Re Harle*, 17 W. R. 21. Onus is on the client.

But where the solicitor had before action offered to take 40*l.* in lieu of a bill of 68*l.*, it was held a case for reference to taxation after twelve months, *Hughes* v. *Murray*, 9 L. T. N. S. 93; and in *Re Loughborough*, 23 Beav. 439, the solicitor kept back his bill, and fraud was presumed against him. Circumstances evidencing fraud.

And when a considerable portion of the bill is for business which in the exercise of a fair and honest discretion ought never to have been done, the Court directs taxation, *Massie* v. *Drake*, 4 Beav. 433; *Re Lees*, 5 Beav. 410; *Re Barrow*, 17 Beav. 547; *Re Dickson*, 8 D. M. G. 655; *Horlock* v. *Smith*, 2 M. & C. 495; *Waters* v. *Taylor*, *ibid.* 526; *Re Brady*, 15 W. R. 632; and see *Cook* v. *Earl of Rosslyn*, 8 Jur. N. S. 875; *Re Hook*, 3 Giff. 372. Fraudulent items.

Where the overcharges evidence *actual fraud*, very slight circumstances Actual fraud.

6 & 7 Vict. c. 73, ss. 37-43.

will induce the Court to re-open the taxation (*Re Harding*, 10 Beav. 250; *Nokes* v. *Warton*, 5 Beav. 448). So where the solicitor has also acted as a trustee, *Todd* v. *Wilson*, 15 L. J. Ch. 450; but see *Stanes* v. *Parker*, 10 Jur. 603.

Gross overcharges.

See further, with reference to great overcharges, in addition to the cases cited above, *Ex parte Andrews*, 13 L. J. Ch. 222; *Ex parte Hemming*, 28 L. T. 144; and *Sayer* v. *Wagstaff*, 5 Beav. 415; *Re Bennett*, 8 Beav. 467; *Re Sladden*, 10 Beav. 488; and at law, *Newton* v. *Boodle*, 4 C. B. 359; *Re Dearden*, 9 Exch. 210.

Where on a petition being presented for taxation of a paid bill, the solicitor offered to repay items objected to, and the petitioner nevertheless brought on his petition for hearing, the Court ordered taxation, treating those items as omitted (*Re Catlin*, 23 Beav. 412; but see *Ex parte Hemming*, 28 L. T. 144).

See further, as to special circumstances at law, *Re Whicher*, 13 M. & W. 549; *Re Wilton*, 13 L. J. Q. B. 17, and *ante*, note (*q*), p. 10.

Twelve months after payment,

(*f*) As to the mode of calculating the time, see *Blunt* v. *Heslop*, 8 Ad. & Ell. 577, cited in note (*e*), p. 7; and in cases where security has been given, see cases cited in note (*b*), p. 16. The petition is considered as presented on the day of answering it (*Sayer* v. *Wagstaff*, 5 Beav. 415, but see s. c. as to accidental delay, and see *Jones* v. *Powys*, 10 L. J. Exch. 49; and note (*r*), p. 11, as to what accounts will constitute one bill).

strictly calculated,

Where a petition was presented within twelve months, but no order was made, the Court refused to allow it to stand over for amendment, twelve months having in the meantime expired (*Barwell* v. *Brooks*, 7 Beav. 345).

an absolute bar to taxation.

The twelve months are an absolute bar to the application if made under the Act (*Re Harper*, 10 Beav. 284; *Re Downes*, 5 Beav. 425; *Binns* v. *Heys*, 13 L. J. Q. B. 28; *Ex parte Hemming*, 28 L. T. 144; *Ex parte Pemberton*, 2 D. M. G. 960); unless, perhaps, actual fraud be shown (*ibid.* per Lord Cranworth); and the rule is the same in the case of an application by a third party or a *cestui que trust*, see *ante*, pp. 13, 15.

Laches and acquiescence.

The lapse of less than the twelve months may be an objection to granting the application, *Re Bayley*, 18 Beav. 415; *Re Pugh*, 32 Beav. 173; on appeal, 11 W. R. 762; *Re Browne*, 1 D. M. G. 322; *Re Whicher*, 13 M. & W. 569.

Where a client having fresh advice kept the bill two months in his possession and then paid it, such delay was held by Vice-Chancellor Wood to be fatal to an application for taxation on the ground of overcharge (*Re Foster*, 2 D. F. J. 105). But the Lords Justices being of opinion that the bill was originally paid under circumstances amounting to pressure, reversed the Vice-Chancellor's decision, and ordered taxation of the bill (8 W. R. 620, and see note (*q*), p. 10, *ante*).

Where time does not run against client.

But the Court may order *delivery* of the bill, though more than twelve months have elapsed from its payment, the solicitor having on payment undertaken to deliver the bills, but neglected to do so (*Re Foljambe*, 9 Beav. 402; *Re Bailey*, 34 Beav. 392), *Re Fisher*, 18 Beav. 183.

Re-opening bills of costs by bill.

As to re-opening bills of costs *by bill*, see *Barwell* v. *Brooks*, 8 Beav. 121; *Blagrave* v. *Routh*, 2 K. & J. 509; 8 D. M. G. 620; *Foley* v. *Smith*, 12 Beav. 154. In *Turner* v. *Hand*, 27 Beav. 561, a solicitor delivered a general estimate of costs due to him, without specifying the particulars, and the client signed a memorandum agreeing to the statement, and requesting a third person, to whom he had given his acceptances, to pay it; and a bill filed by the client three years afterwards for delivery and taxation was dismissed with costs. See, also, *Todd* v. *Wilson*, 15 L. J. Ch. 450; *Stanes* v. *Parker*, 10 Jur. 603.

Power for taxing officer to request officers of other courts to tax portions of the bill.

XLII. And be it enacted, that in all cases in which such bill shall have been referred to be taxed and settled, the officer to whom such reference is made shall be at liberty to request the proper officer of any other court having such

an officer to assist him in taxing and settling any part of such bill, and such officer so requested shall thereupon proceed to tax and settle the same, and shall have the same powers and may receive the same fees in respect thereof as upon a reference to him by the court of which he is such officer, and shall return the same, with his opinion thereon, to the officer who shall have so requested him to tax and settle the same; and the officer to whom such reference is made shall not be paid any fee for that portion of the bill which shall have been so taxed and settled by the officer of such other court at his request (*g*). 6 & 7 Vict. c. 73, ss. 37-43.

(*g*) See add. Ord. (costs) Aug. 1875 (pt. II., *post*), and notes, as to the taxing-masters.

XLIII. And be it enacted, that all applications (*h*) made under this Act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor (*i*) and that upon the taxation and settlement of any such bill the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of Court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced (*k*) according to the course of the court in which such reference shall be made; and in case such reference shall be made in any Court of common law, it shall be lawful for such Court or any judge thereof to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such Court or judge shall deem proper. Applications for taxing bill of costs, how to be made. Certificate of taxation to be final. Judgment may be entered.

(*h*) By Ord. 17, Apr. 1867, r. 1 (set out p. 20, *infra*), all special applications for taxation must now be made by summons, and this applies, though the client also asks that a sum of money improperly retained by the solicitor may be refunded, *Re May*, 34 Beav. 132; *Re Edmunds*, 19 W. R. 104. Special application for taxation.

(*i*) As to the title of the application, see *Re Vallance*, 8 Scott, N. R. 232; *Re Hair*, *ibid.* 231; *Re Walton*, 4 K. & J. 78. It need not be headed in the matter of the Act (*ibid.*). It must state the time of payment, if presented after payment (*Re Mash*, 15 Beav. 83). Title and form of application.

(*k*) An action brought after taxation ordered by a Court of Equity is a Payment how enforced.

6 & 7 Vict. c. 73, ss. 37-43.

contempt (*Re Campbell*, 3 D. M. G. 585); the order may be enforced by attachment (*Lane* v. *Oliver*, 2 Hare, 97; *Re Saull*, 3 N. R. 701; *Re Reynolds*, 10 W. R. 709); and see *Re Dendy*, 21 Beav. 565, and Ord. XLII. r. 5 (Part II. *post*).

Order 17 April, 1867. Rule 1. Special applications to be by summons in chambers.

It is provided by Rule I. of the Order of 17th April, 1867, as follows:—

1. *All applications made under the Statute 6th and 7th Victoria, chapter 73, to refer any bill of any attorney or solicitor of his fees, charges, and disbursements, for any business done by such attorney or solicitor, to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, or for any or either of those purposes, shall hereafter be made to a judge at chambers by summons, instead of by special petition to the Court, except applications for orders of course, which are to be made as heretofore.*

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23 & 24 Vict. c. 127.

ATTORNIES AND SOLICITORS ACT, 1860.

23 & 24 VICT., CAP. 127, SS. 27—29.

* See marginal note, p. 3, *ante*.

"An Act to amend the Laws relating to Attornies, Solicitors, Proctors, and Certificated Conveyancers."*

Interest on costs.

* Now the Chancery Division (Judicature Act, 1873, s. 34 (2)).

Interest on costs.

XXVII. Whenever a decree or order is made by the Court of Chancery* in which the payment of any costs previously taxed, either in the suit or proceeding in which such decree or order is made, or in any other suit or proceeding is ordered, and whether the certificate of such previous taxation have been made before the passing of this Act, or be made thereafter, it shall be lawful for the Court or judge making such decree or order to order and direct the amount of such costs, as taxed, including the costs of taxation as ascertained by the said certificate, to be paid with interest (*a*) thereon at the rate of 4*l.* per cent. per annum, from the date of the certificate, the amount of

such interest to be verified by affidavit, and to be payable and recoverable out of the same fund or in the same manner as the amount of such costs (*b*). 23 & 24 Vict. c. 127.

(*a*) By 33 & 34 Vict. c. 28, s. 17, interest may be allowed on taxation in respect of disbursements and advances, p. 30, *post*.

(*b*) See note (*k*) to sect. 43 (page 19). In directing payment, out of the purchase-money of the mortgaged property, of a mortgagee's principal, interest, and costs, the Court directed interest to be paid on the costs from the date of the certificate, *Whitfield* v. *Roberts*, 9 W. R. 844. The Act only enables the solicitor, and not a party to the suit, to claim interest on his costs, *Jenner* v. *Morris*, 11 W. R. 943. Orders were made under this section in cases where payment of costs had been unavoidably delayed, *Carter* v. *Carter*, 8 L. T. N. S. 692; *Fox* v. *Charlton*, 6 N. R. 352; *Re Campbell*, 19 W. R. 427.

Application *by solicitor* for interest on costs.

XXVIII. In every case in which an attorney or solicitor *(*a*) shall be employed (*b*) to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge (*c*) before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge (*d*) upon the property recovered or preserved (*e*), and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations.

* See marginal note, p. 3, *ante*.

Solicitor to have charge for costs on property preserved or recovered.

23 & 24 Vict. c. 127.

(*a*) The London agent of a country solicitor is within the section, but only subject to any set-off or equity existing between the client and country solicitor. See *Peatfield* v. *Barlow*, L. R. 8 Eq. 61 ; *Cockayne* v. *Harrison*, L. R. 15 Eq. 298.

Attorney's agent.

Personal representatives.

Attorney employed.

Can infant or married woman employ.

The lien is not personal to the solicitor, but extends to his personal representatives, *Baile* v. *Baile*, L. R. 13 Eq. 497, 509.

(*b*) The word "employed" applies to a solicitor employed in good faith by the next friend of an infant who, when he comes of age, adopts the proceedings, *Baile* v. *Baile*, L. R. 13 Eq. 497 ; but where an infant plaintiff recovered property the Court refused to charge the real property with the next friends' solicitors' costs on a petition under the act, *Turdrew* v. *Howell*, 2 Giff. 281. See *Bonser* v. *Bradshaw*, 30 L. J. Ch. 159 ; s. c. 10 W. R. 481 ; on a second hearing, 4 Giff 260, 9 Jur. N. S. 1048 ; but in a suit an infant's costs were made a charge, *Pritchard* v. *Roberts*, L. R. 17 Eq. 222. A married woman's property is chargeable with the costs of her suit, *Re Keane*, L. R. 12 Eq. 115.

Who may declare the lien.

(*c*) The order declaring the charge must be made in the branch of the Court to which the suit was attached, and may be made though the suit has come to an end, *Heinrich* v. *Sutton, re Fiddey*, L. R. 6 Ch. 865 ; *Jones* v. *Frost*, 7 L. R. Ch. 773. See *Wilson* v. *Round*, 12 W. R. 402.

Solicitor's lien *on papers.*

(*d*) See on solicitor's lien generally, Fisher 168. A solicitor who conducts a cause to its conclusion in the place of one who by arrangement with his client retires from conducting it, has priority for his costs in case of a deficiency of assets, *Cormack* v. *Beisley*, 3 De G. & J. 157 ; but see *Re Audley Hall Coy.*, L. R. 6 Eq. 245, as to priorities of successive solicitors.

Solicitor refusing to proceed.

A solicitor who begins a cause, engages to continue to act till the end of it ; and if he refuses to go through with it he has no lien and cannot even bring an action for his bill : *Cresswell* v. *Byron*, 14 Ves. 272 ; *Commerell* v. *Poynton*, 1 Swanst. 1.

Solicitor discharged for default.

If a solicitor discharges himself (see *Robins* v. *Goldingham*, 13 L. R. Eq. 440), or is discharged for clear negligence or incapacity, he must produce the papers in the cause to the new solicitor (*Re Williams*, 28 Beav. 465), though he may have a right to have them redelivered to him after the hearing (*Colegrave* v. *Manley*, Turn. & Russ. 400 ; *Re Suckling*, 20 W. R. 277 ; *Heslop* v. *Metcalfe*, 3 M. & Cr. 183 ; *Webster* v. *Le Hunt*, 9 W. R. 804, 827), and may be entitled to an undertaking from the new solicitor to prosecute the suit with due diligence (*Cane* v. *Martin*, 2 Beav. 584). So when a firm was discharged owing to a change in the partnership (*Griffiths* v. *Griffiths*, 2 Hare, 587 ; *Rawlinson* v. *Moss*, 9 W. R. 733).

Not for default.

If the solicitor is discharged, not for his own default, but on other grounds, by the client *or his personal representative*, he cannot be compelled to afford facilities to the client and the new solicitor by giving up the papers before he is paid his costs : *Lord* v. *Wormleighton*, Jac. 586 ; *Re Smith*, 9 W. R. 396 ; and it is decided that unless a taxation is pending the costs claimed must be paid to the solicitor and not into court (*Re Faithful*, 6. L. R. Eq. 325).

Successive clients.

If the solicitor is discharged by persons *succeeding to the rights* of his client, but not *claiming by privity of title* with him, he must give up the papers to those persons free from any lien for his previous expense and trouble. See *Simmonds* v. *G. E. Ry Coy.*, 16 W. R. 1100, where the client became bankrupt, and it was decided that as the assignee came in by a title adverse to the bankrupt, he might employ a new solicitor and have the papers in the court delivered to him without paying the previous costs. See *Re South Essex Estuary Coy.*, L. R. 4 Ch. 215 ; *Re Union Cement & Brick Coy.* ; L. R. 4 Ch. 627.

Declaration of lien *on property preserved.*

(*e*) The section only applies to the particular costs of the suit in which the property has been preserved or recovered (*Ex parte Thompson*, 3 L. T. N. S. 317). Where a solicitor had obtained a foreclosure decree for a client, who afterwards died, though a decree had been made for the administration of his estate, the court under this section made a charging order on the real estate of the client for the costs of the suit, *Wilson* v. *Round*, 4 Giff. 416.

Priority over charges.

The solicitor's lien under this section, has priority over all charges created

by the client, *Haymes* v. *Cooper*, 33 Beav. 431 (see *Baile* v. *Baile*, L. R. 13 Eq. 497, 509), and over the costs of a subsequent administration suit, *Wilson* v. *Round*, loc. cit., and see *Ex parte Cleland*, L. R. 2 Ch. 808, where it was held that though a fund recovered in certain proceedings was subject to set-off as between the parties to the proceedings, the solicitor's lien was paramount to such right of set-off, *Ex parte Smith*, L. R. 3 Ch. 125; compare *Mercer* v. *Graves*, 7 Q. B. 499, *Re Keane*, 12 L. R. Eq. 115, where the lien was held to be a charge on an annuity fund paramount to the annuity, see also *Birchall* v. *Pugin*, L. R. 10 C. P. 397, where the priority of the attorney as against an execution creditor was considered.

Priority over annuities and other claims.

Where the client was defendant in a foreclosure suit, the result of which was that the chance of foreclosure against him was lessened, a petition for a lien on the mortgaged property as *preserved* by the solicitor's labour was held to be within the Act, *Scholefield* v. *Lockwood*, 7 L. R. Eq. 83. See *Smith* v. *Winter*, 18 W. R. 448; *Jones* v. *Frost*, L. R. 7 Ch. 773, where it was held that a solicitor is entitled to a charge for his costs on property the subject of a successful suit, conducted by him against an incumbrancer, although the incumbrance be entirely valueless, provided it was a cloud upon the title.

Property *recovered or preserved.*

The solicitor's costs are not a charge on the property recovered generally, but only to the extent of the client's interest therein, *Berrie* v. *Howitt*, L. R. 9 Eq. I., but compare *Bailey* v. *Birchall*, 2 H. & M. 371, where a solicitor was allowed a lien on the estate of a deceased person, though the executors had such a right of set-off against the client as prevented him from taking any actual interest in the fund. See *Ex parte Cleland*, L. R. 2 Ch. 808; *Ex parte Smith*, L. R. 3 Ch. 125.

So where a plaintiff sued for £103 wages, which he was allowed, but £170 was found due from him for certain shares to the defendant, so that he did not in fact recover anything in the suit, the plaintiff's solicitor was nevertheless held entitled to a lien on the shares under the section (*Re The Philippine*, L. R. 1 A. & E. 309, 15 W. R. 462), and where a *cestui qui trust* sued for a trust fund, alleging that the trustee was dealing improperly with it, and the trustee's solicitor put in an appearance only but obtained no order, the suit being discontinued, the trustee's solicitor was allowed a lien for his costs on the fund, *Morris* v. *Francis*, cited in 12 Sol. Journ. 718. See, too, *Ex parte Morrison*, W. N. (1868) 288; *Twynam* v. *Porter*, 11 L. R. Eq. 181, where it was held that a compromise entered into by the client subsequently to the appointment of a receiver could not displace the lien.

Where new trustees of property had been appointed on petition, and the costs, charges, and expenses of all parties had been ordered to be paid, the Court refused to charge the property with the costs of the petition under this Act, *Re Viney*, 3 W. N. (1868) 243, 18 L. T. N. S. 851. See *Pinkerton* v. *Easton*, 8 L. R. 16 Eq. 490, where a decree was made in an administration suit for the administration of an estate, and the appointment of a new trustee, but was not prosecuted beyond bringing in certain accounts, and it was held that no property was "recovered" or "preserved."

Property is held to be *preserved* under the section which has been managed and retained for the rightful owner, *Baile* v. *Baile*, 13 L. R. Eq. 497, 508.

An easement though preserved is not property within this section *Foxon* v. *Gascoigne*, L. R. 9 Ch. 654.

Easements not property.

XXIX. In every case in which an attorney or solicitor has been or shall be employed to prosecute or oppose any inquiry whether a person is a lunatic, idiot, or of unsound mind, and incapable of managing himself or his affairs, or in or about any proceedings consequent upon such in-

Taxation and payment of deceased lunatic's costs.

23 & 24 Vict. c. 127.

quiry, and the costs of such attorney or solicitor have not been paid in the lifetime of such person, it shall be lawful for the Lord High Chancellor or the Lords Justices, or other the person or persons intrusted by Her Majesty with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind,* to make such and the like orders and to exercise the like power and authority for taxation of and for raising and payment of such costs after the death of such person as could or might have been exercised or made in his lifetime (*a*); and such orders and proceedings shall be be as valid and effective to all intents and purposes as if made in the lifetime of the lunatic: Provided always, that it shall not be lawful for the Court or judge to make any such order but within six years next after the right to recover such costs, charges, and expenses shall have accrued (*b*).

* See now s. 7 of the Judicature Act, 1875, *post.*

Costs in lunacy.

(*a*) See 16 & 17 Vict. c. 70 (Lunacy Regulation Act, 1853), s. 145, which provides that costs incurred under the Act may be charged on the lunatic's property.

Within six years.

(*b*) When a lunatic died in June, 1853, and the solicitor in the lunacy—having obtained an order for taxation of his costs in the lunacy matter in February, 1854, and completed such taxation in February, 1855—in October, 1860, presented a petition for an order to charge the lunatic's estate under this section, it was held by L. J. Knight Bruce that the right to recover accrued on the death of the lunatic; and by L. J. Turner that it accrued on the order for taxation being obtained. More than six years having elapsed since either of those periods, the petitioner was held to be barred of all remedy under the concluding proviso of the section (*Ex parte Turner, Re Cumming*, 2 D. F. J. 376, 9 W. R. 213).

ATTORNIES AND SOLICITORS ACT, 1870.

33 & 34 VICT., CHAP. 28.

An Act to amend the law relating to the remuneration of Attornies and Solicitors. [14*th July*, 1870.]

33 & 34 Vict. c. 28.

Whereas it is expedient to amend the law relating to the remuneration of attornies and solicitors:

Be it enacted, &c., as follows:

33 & 34 Vict. c. 28.

Preliminary.

I. This Act may be cited as "The Attornies and Solicitors Act, 1870." Short title.

II. This Act shall not extend to Scotland. Extent of Act.

III. In the construction of this Act, unless where the context otherwise requires, the words following have the significations hereinafter respectfully assigned to them; that is to say, Interpretation of terms.

The words "attorney or solicitor" * mean an attorney, solicitor, or proctor, qualified according to the provisions of the Acts for the time being in force, relating to the admission and qualification of attornies, solicitors, or proctors: * See marginal note, p. 3.

"Person" includes a corporation:

"Client" includes any person who, as a principal or on behalf of another person, retains or employs, or is about to retain or employ, an attorney or solicitor, and any person who is or may be liable to pay the bill of an attorney or solicitor for any services, fees, costs, charges, or disbursements.

PART I.—*Agreements between Attornies or Solicitors and their Clients.*

IV. An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or per-centage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such The remuneration of attornies and solicitors may be fixed by agreement.

33 & 34 Vict. c. 28.

agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement, and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a Court or a judge to be taken thereon by motion or petition (*a*), and such Court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made.

Amount payable under agreement not to be paid until allowed by taxing officer.

(*a*) The opinion of the court cannot be required to be taken before some money is payable under the agreement (*Re Attornies Act*, L. R. 1 C. D. 573).

Saving of interests of third parties.

V. Such an agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of such costs, unless such person has otherwise agreed: Provided always, that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own attorney or solicitor under the same.

Agreements shall exclude further claims.

VI. Such an agreement shall be deemed to exclude any further claim of the attorney or solicitor beyond the terms of the agreement in respect of any services, fees, charges, or disbursements in relation to the conduct and completion of the business in reference to which the agreement is

made, except such services, fees, charges, or disbursements, if any, as are expressly excepted by the agreement. 33 & 34 Vict. c. 28.

Reservation of responsibility for negligence.

VII. A provision in any such agreement that the attorney or solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such attorney or solicitor, shall be wholly void.

Examination and enforcement of agreements.

VIII. No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements in respect of which the agreement is made, by the Court in which the business, or any part thereof, was done, or a judge thereof, or if the business was not done in any Court, then where the amount payable under the agreement exceeds fifty pounds, by any superior court of law or equity or a judge thereof, and where such amount does not exceed fifty pounds, by the judge of a county court which would have jurisdiction in an action upon the agreement.

Improper agreements may be set aside.

IX. Upon any such motion or petition as aforesaid, if it shall appear to the Court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such Court or judge by rule or order in such manner and subject to such conditions, if any, as to the costs of such motion or petition as such Court or judge may think fit; but if the terms of such agreement shall not be deemed by the Court or judge to be fair and reasonable, the same may be declared void, and the Court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges, and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner and according to the same rules as if such agreement had not been made; and the Court or judge

33 & 34 Vict. c. 28.

may also make such order as to the costs of and relating to such motion or petition, and the proceeding thereon, as to the said Court or judge may seem fit.

Agreements may be re-opened after payment in special cases.

X. When the amount agreed for under any such agreement has been paid by or on behalf of the client, or by any person chargeable with or entitled to pay the same, any Court or judge having jurisdiction to examine and enforce such an agreement may, upon application by the person who has paid such amount, within twelve months after the payment thereof, if it appears to such Court or judge that the special circumstances of the case require the agreement to be re-opened, re-open the same, and order the costs, fees, charges, and disbursements to be taxed, and the whole or any portion of the amount received by the attorney or solicitor to be repaid by him, on such terms and conditions as to the Court or judge may seem just.

Where any such agreement is made by the client in the capacity of guardian, or of trustee under a deed or will, or of committee of any person or persons whose estate or property will be chargeable with the amount payable under such agreement, or with any part of such amount, the agreement shall before payment be laid before the taxing officer of a court having jurisdiction to enforce the agreement, and such officer shall examine the same, and may disallow any part thereof, or may require the direction of the Court or a judge to be taken thereon by motion or petition; and if in any such case the client pay the whole or any part of the amount payable under the agreement, without the previous allowance of such officer or Court or judge as aforesaid, he shall be liable at any time to account to the person whose estate or property is charged with the amount paid, or with any part thereof for the amount so charged; and if in any such case the attorney or solicitor accept payment without such allowance, any court which would have had jurisdiction to enforce the agreement may, if it think fit, order him to refund the amount so received by him under the agreement.

Prohibition of certain stipulations.

XI. Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of

the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action, or proceeding (*a*). 33 & 34 Vict. c. 28.

(*a*) It seems that an agreement giving the solicitor in case of success what was an equivalent to one-tenth of the property recovered, is invalid under this section. *Re Attornies Act*, L. R. 1 C. D. 573.

XII. Nothing in this Act contained shall give validity to any disposition, contract, settlement, conveyance, delivery, dealing, or transfer, which may be void or invalid against a trustee or creditor in bankruptcy, arrangement, or composition, under the provisions of the laws relating to bankruptcy. Not to give validity to contracts, &c., which may be void in bankruptcy.

XIII. Where an attorney or solicitor has made an agreement with his client in pursuance of the provisions of this Act, and anything has been done by such attorney or solicitor under the agreement, and before the agreement has been completely performed by him, such attorney or solicitor dies or becomes incapable to act, an application may be made to any Court which would have jurisdiction to examine and enforce the agreement by any party thereto, or by the representatives of any such party, and such Court shall thereupon have the same power to enforce or set aside such agreement, so far as the same may have been acted upon, as if such death or incapacity had not happened; and such Court, if it shall deem the agreement to be in all respects fair and reasonable, may order the amount due in respect of the past performance of the agreement to be ascertained by taxation, and the taxing officer in ascertaining such amount shall have regard so far as may be to the terms of the agreement, and payment of the amount found to be due may be enforced in the same manner as if the agreement had been completely performed by the attorney or solicitor. Provision in case of death or incapacity of the attorney.

XIV. If, after any such agreement as aforesaid shall have been made, the client shall change his attorney or solicitor before the conclusion of the business to which such agreement shall relate (which he shall be at liberty to do As to change of attorney after agreement.

33 & 34 Vict. c. 28.

notwithstanding such agreement), the attorney or solicitor, party to such agreement, shall be deemed to have become incapable to act under the same within the meaning of section thirteen of this Act; and upon any order being made for taxation of the amount due to such attorney or solicitor in respect of the past performance of such agreement, the Court shall direct the taxing master to have regard to the circumstance under which such change of attorney or solicitor has taken place; and, upon such taxation, the attorney or solicitor shall not be deemed entitled to the full amount of the remuneration agreed to be paid to him unless it shall appear that there has been no default, negligence, improper delay, or other conduct on his part affording reasonable ground to the client for such change of attorney or solicitor.

Agreements shall be exempt from taxation.

XV. Except as in this part of this Act provided, the bill of an attorney or solicitor for the amount due under an agreement made in pursuance of the provisions of this Act shall not be subject to any taxation, nor to the provisions of the Act of the sixth and seventh Victoria, chapter seventy-three, and the Acts amending the same respecting the signing and delivery of the bill of an attorney or solicitor.

Part II.—*General Provisions.*

Security may be taken for future costs.

XVI. An attorney or solicitor may take security from his client for his future fees, charges, and disbursements, to be ascertained by taxation or otherwise.

Interest may be allowed on taxations in respect of disbursements and advances.

XVII. Subject to any general rules or orders hereafter to be made upon every taxation of costs, fees, charges, or disbursements, the taxing officer may allow interest at such rate and from such time as he thinks just on moneys disbursed by the attorney or solicitor for his client, and on moneys of the client in the hands of the attorney or solicitor, and improperly retained by him.

Taxing officer to have regard to character of services.

XVIII. Upon any taxation of costs, the taxing officer may, in determining the remuneration, if any, to be allowed to the attorney or solicitor for his services, have regard, subject to any general rules or orders hereafter to be made, to the skill, labour, and responsibility involved.

33 & 34 Vict. c. 28.

Revival of order for payment of costs.

XIX. Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen.

XX. [By s. 20, Solicitors may perform acts appertaining to office of proctor.]

LANDS CLAUSES CONSOLIDATION ACT, 1845.

7 & 8 VICT. CAP. 18.

An Act for consolidating in one Act certain Provisions usually inserted in Acts authorising the taking of Lands for Undertakings of a Public Nature. [*8th May*, 1845.

SS. I.—IV.; LXIX.—LXXXVII.

7 & 8 Vict. c. 18.

Act to apply to all undertakings authorised by Acts hereafter to be passed.

WHEREAS it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves; be it enacted, &c., that this Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which

7 & 8 Vict. c. 18, ss. 1–4.

shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act.

Interpretations in this Act:

With respect to the construction of this Act and of Acts to be incorporated therewith, be it enacted as follows:

"Special Act:"

II. The expression "the special Act," used in this Act, shall be construed to mean any Act which shall be hereafter passed which shall authorise the taking of lands for the undertaking to which the same relates, and with which this Act shall be so incorporated as aforesaid; and the word

"prescribed:"

"prescribed," used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word shall occur shall be construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special Act" had been used; and the expression "the

"the works:"

works" or "the undertaking" shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorised to be executed; and the expression

"Promoters of the undertaking:"

"the promoters of the undertaking" shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking.

Interpretation in this and the special Act:

III. The following words and expressions, both in this and the special Act, shall have the several meanings hereby assigned to them, unless there be something either in the subject or context repugnant to such construction; (that is to say),

Number:

Words importing the singular number only shall include the plural number, and words importing the plural number only shall include the singular number:

Gender.

Words importing the masculine gender only shall include females:

"Lands:"

The word "lands" shall extend to messuages, lands, tenements, and hereditaments (*a*) of any tenure:

"Lease:"

The word "lease" shall include an agreement for a lease:

"Month:"

The word "month" shall mean calendar month:

8 Vict. c. 18.

"Superior Courts:"

The expression "superior courts" shall mean Her Majesty's superior Courts of Record at Westminster or Dublin, as the case may require:

"Oath:"

The word "oath" shall include affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath:

"County:"

The word "county" shall include any riding or other like division of a county, and shall also include county of a city or county of a town:

"the Sheriff:"

"the Clerk of the Peace:"

The word "sheriff" shall include under-sheriff, or other legally competent deputy; and where any matter in relation to any lands is required to be done by any sheriff or by any clerk of the peace, the expression "the sheriff," or the expression "the clerk of the peace," shall in such case be construed to mean the sheriff or the clerk of the peace of the county, city, borough, liberty, cinque port, or place where such lands shall be situate; and if the lands in question, being the property of one and the same party, be situate not wholly in one county, city, borough, liberty, cinque port, or place, the same expression shall be construed to mean the sheriff or clerk of the peace of any county, city, borough, liberty, cinque port, or place, where any part of such lands shall be situate:

"Justices:"

The word "justices" shall mean justices of the peace acting for the county, city, liberty, cinque port, or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter; and where such matter shall arise in respect of lands being the property of one and the same party, situate not only in any one county, city, borough, liberty, cinque port, or place, the same shall mean a justice acting for the county, city, borough, liberty, cinque port, or place where any part of such lands shall be situate, and who shall not be interested in such matter; and where any matter shall be authorised or required to be done by two justices, the

8 Vict. c. 18.

expression "two justices" shall be understood to mean two justices assembled and acting together:

"Two Justices:"

"Owner:"

Where under the provisions of this or the special Act, or any Act incorporated therewith, any notice shall be required to be given to the owner of any lands, or where any act shall be authorised or required to be done with the consent of any such owner, the word "owner" (*b*) shall be understood to mean any person or corporation who, under the provisions of this or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking.

"The Bank:"

The expression "the Bank" shall mean the Bank of England where the same shall relate to monies to be paid or deposited in respect of lands situate in England, and shall mean the Bank of Ireland where the same shall relate to monies to be paid or deposited in respect of lands situate in Ireland.

(*a*) The power to purchase lands was held to include power to purchase a rent charge, *Re Brewer*, L. R. 1 Ch. Div. 409.

"Owner:" (*b*) As to the meaning of the word "owner" in the Act, see *post*, note (*b*) to s. 76, p. 47.

Short title of the Act.

IV. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments, it shall be sufficient to use the expression "The Lands Clauses Consolidation Act, 1845."

Application of Compensation.

Purchase money payable to parties under disability amounting to 200*l.* to be deposited in the Bank.

And with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows:

LXIX. If the purchase-money or compensation which shall be payable in respect of any lands or any interest therein, purchased or taken by the promoters of the undertaking from any corporation, tenant for life or in tail, married woman seised in her own right or entitled to dower, guardian, committee of lunatic or idiot, trustee, executor or administrator, or person having a partial or

qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands, amount to or exceed the sum of two hundred pounds, the same shall be paid (*a*) into the Bank, in the name and with the privity of the Accountant-General * of the Court of Chancery in England (*b*) if the same relate to lands in England or Wales, or the Accountant-General of the Court of Exchequer in Ireland if the same relate to lands in Ireland, to be placed to the account there of such Accountant-General * *ex parte* the promoters of the undertaking (describing them by their proper name), in the matter of the special Act (citing it), pursuant to the method prescribed by any Act for the time being in force for regulating monies paid into the said courts; and such monies shall remain so deposited until the same be applied to some one or more of the following purposes; (that is to say),

8 Vict. c. 18. s. 69.

* Now "Paymaster-General." See 35 & 36 Vict. c. 44, s. 4.

Application of monies deposited.

In the purchase or redemption of the land tax (*c*) or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes (*d*); or

In the purchase of other lands, to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled (*e*); or

If such money shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the Court of Chancery * * shall direct (*f*); or

* * Now the Chancery Division (Judicature Act, 1873, s. 34 (2)).

In payment to any person becoming absolutely entitled to such money (*g*).

8 Vict. c. 18. s. 69.

(*a*) It is provided by the Chancery Funds' Rules, 1874 (Part II. *post*) that money paid into Court pursuant to this section, "in respect of lands in "England or Wales, shall be placed in the books at the Chancery Pay "Office to the credit of Ex parte the promoters of the undertaking, in the "matter of the Special Act (citing it), as directed by the said Lands Clauses "Consolidation Act, 1845, and some words shall be added in each case "briefly expressive of the nature of the disability to sell and convey, by "reason of which the money shall be so paid in, as stated in the request for "the direction to receive the money."

Payment into Court. Chancery Funds' Rules, 1874, r. 32.

When dispensed with.

Payment into court under this section may be dispensed with by the Court where the money is immediately required to be paid to another account, *e.g.*, to a lunatic's account, *Re Milnes*, L. R. 1 Ch. Div. 28.

Where the company, instead of paying the purchase-money of lands belonging unto a corporation into court under this section, paid it to the vendors, the latter were, on motion, ordered to pay it into court for the purpose of interim protection (*London and N. W. Railway* v. *Corporation of Lancaster*, 15 Beav. 22.)

Purchase money *not converted* into personalty.

The purchase-money paid into court under these sections, is to be laid out in purchase of realty, and therefore remains impressed with the character of realty, *Re Harrop*, 3 Drew. 726; *Re Bagot*, 10 W. R. 607; *Re Taylor*, 9 Hare, 598; *secus* where the land is taken from vendors competent to convey under section 76. See note (*z*) to section 78, *post*, p. 46, and *Re Stewart*, 1 Sm. & G. 32; *Re Horner*, 5 De G. & Sm. 483; *Midland Railway Company* v. *Oswin*, 1 Coll. 80; *Dixie* v. *Wright*, 32 Beav. 662, where accumulations of dividends on a fund paid in under this section, the fund having been forgotten, were held to pass under a will as personalty, *Re Skegg*, 13 W. R. 567; *Ex parte Hardy*, 30 Beav. 206. But see *Re Manchester and Southport Railway Company*, 19 Beav. 365.

Interest *not* payable by company.

(*b*) As soon as the money is paid into the Bank, interest ceases to be payable by the company (*Lewis* v. *South Wales Railway Company*, 10 Hare, 113, unless there is a special agreement. In *Ex parte Earl of Hardwicke*, 1 D. M. G. 297, where the company were ordered to pay interest under a special agreement, it was by consent agreed that no objection should be taken for want of jurisdiction, but that the question should be decided as if a bill had been filed. See *Re Divers*, 1 Jur. N. S. 995; *Chambers* v. *White*, 14 Jur. 1129.

Redeeming land tax.

(*c*) A tenant for life, who has redeemed the land-tax, will, it seems, be allowed to reimburse himself out of the purchase-monies paid into court (*Ex parte Northwick*, 1 Y. & Coll. Exch. Rep. 166).

Discharging incumbrances.

(*d*) The following applications of purchase-money have been held to be within this section, as equivalent to discharges of incumbrances or otherwise.

In the case of a corporation, the paying off of bonds or mortgages for repayment of money raised for sanitary purposes, *Re Derby Municipal Estates*, W. N. 1876, 188.

Enfranchisement.

Enfranchisement of copyholds, *Dixon* v. *Jackson*, 25 L. J. Ch. 588, *Re Cheshunt College*, 3 W. R. 638.

Buying lessees' interest.

Purchasing a lessee's interest, *Ex parte Corporation of Sheffield*, 21 Beav. 62; *Ex parte Corporation of London*, L. R. 5 Eq. 418, or redeeming a quit-rent, *Ex parte Studdert*, 6 Ir. Ch. Rep. 53.

Quit rent.

Buildings and improvements.

Erecting buildings where special circumstances require it, *Re Johnson*, L. R. 8 Eq. 348, but not in repairs or improvements which do not put new or improved buildings on the ground, *Drake* v. *Trefusis*, L. R. 10 Ch. 364; see *Re Dummer*, 2 D. J. S. 515; *Re Speer*, W. N. 1876, 211, and cases cited in *Re Leigh*, L. R. 6 Ch. 887, 891, and cases on sect. 23 of the Leases and Sales of Settled Estates Act, 1856, *post*.

If a charge on the inheritance.

(*e*) But where the land is in settlement the Court will not repay a tenant for life what he has expended, unless the expenditure was properly a charge on the inheritance, nor even order reinvestment in permanent improvements on the property if the remaindermen object, *Re Leigh*, L. R. 6 Ch. 887; see *Brunshill* v. *Caird*, L. R. 16 Eq. 493.

Vicarage houses.

In the case of corporations, however, the Court more readily allows reinvestment in new buildings, *e.g.*, of farms (*Ex parte Rector of Shipton*, 19 W.

R. 549), or a new vicarage house (*Re Incumbent of Whitfield*, 1 J. & H. 610), but hesitates to allow the purchase-money to be expended in repairs, *Re Nether Stowey Vicarage*, L. R. 17 Eq. 156, though it has a discretion to allow them; *Ex parte Rector of Claypole*, L. R. 16 Eq. 574, and cases there cited; *Ex parte Rector of Grimoldby*, L. R. 2 C. D. 224 (where the Court refused to apply the money paid in to the restoration of the chancel, and to paying off money borrowed from the Governors of Queen Anne's Bounty), and expenditure for such purposes already incurred by the incumbent has been recouped, *Ex parte Rector of Gamston*, L. R. 1 Ch. Div. 477, but the Court of Appeal held that it had no power to make such an order where the expenditure had been for rebuilding a rectory house, *Williams* v. *Aylesbury Railway Company*, L. R. 9 Ch. 684; but see *Re Partington*, 1 N. R. 177. 8 Vict. c. 18. s. 63.

For the application of compensation money in the case of common lands, see *Nash* v. *Coombs*, L. R. 6 Eq. 51, and as to lands in which freemen have an interest, see *Ex parte Mayor of Lincoln*, 21 L. J. Ch. 621. Common lands.

(*f*) The petition for payment out or reinvestment must be accompanied by an affidavit of no incumbrances, see Consol. Ord. XXXIV. 3, which provides that— Affidavit of no incumbrances

3. *In the case of petitions under Acts of Parliament authorising the sale of property for public purposes, where the purchase-money is directed by any such Acts of Parliament to be paid into court, the petitioners claiming to be entitled to the moneys so paid in must make an affidavit, not only verifying their title, but also stating that they are not aware of any right in any other person, or of any claim made by any other person, to the sum of £ in the said petition mentioned, or to any part thereof, or if the petitioners are aware of any such right or claim, they must in such affidavit state or refer to and except the same.* Cons. Ord. XXXIV. Rule 3. Petitioners to make affidavit as to incumbrances.

See as to the necessity of the affidavit, *Ex parte Grainge*, 3 Y. & C. Exch. 62; *Ex parte Hollick*, 4 Railway Cases, 498. By whom to be made.

The affidavit must be made though income only is proposed to be dealt with, *Ex parte Warden of Winchester College*, 14 W. R. 788; *Re Milne*, 8 L. T. N. S. 199, overruling *Ex parte Baroness of Braye*, 9 Hare, App. vii.

An affidavit by one of several petitioners is sufficient, *Re Vale of Neath Railway*, W. N. 1866, 78. The tenant for life being infirm, and the remaindermen being infants, the order for payment of dividends to the tenant for life was made on the affidavit of the executors, *Re Smith's Leaseholds*, 14 W. R. 949, and in another case on the affidavit of the petitioner's solicitor, *Re Halsey*, W. N. 1869, 68, and on a petition by trustees of a charity, the affidavit of their clerk was sufficient, *Re Edward Sixth Almshouses*, 16 W. R. 841.

Where a fund in court arises from a settled estate, and a tenant in tail who has barred the entail applies for payment, an affidavit of no incumbrances must be made, Seton, 525; *Thornhill* v. *Millbank*, 12 W. R. 523.

Where a married woman would be entitled there must be an affidavit of no settlement; Chancery Funds Rules, 1874 (Part II., *post*), r. 52, and see *ibid.* rr. 36-59, as to payment out of court generally. Affidavit of no settlement. Chancery Funds Rules, 1874, r. 52.

Payment to trustees has been allowed in the case of trustees for a charity in *Re Tid St. Giles' Charity*, 17 W. R. 758; *Re Faversham Charities*, 10 W. R. 291 (where the trustees had a power of sale). See *Re Spurstowe's Charity*, L. R. 18 Eq. 279; and as to dispensing with the consent of the Charity Commissioners, see *Re Lister's Hospital*, 6 D. M. G. 184, and note (*a*) to s. 1 of Trustee Relief Act, *post*, p. 64. Payment out to trustees. To charity trustees.

8 Vict. c. 18, s. 69.

The money was ordered to be carried to a separate account, and the dividends paid to trustees in *Re Reaston*, 20 W. R. 355, following *Re Horwood*, 3 Giff. 218, decided under sec. 78. As to payment out to a sole trustee, see *Re Roberts*, 9 W. R. 758, *Re Savory*, L. R. 8 Ch. 737. Payment out of small sums to solicitors on their undertaking to distribute them is often allowed, and for order to pay out to trustees, "or either of them," see note to section 71, *post*.

Payment of dividends to trustees.

Not of principal.

Payment out to trustees was refused in *Aston* v. *Meredith*, L. R. 13 Eq. 492, under the provisions of the Leases and Sales Act, and Partitions Act, but under this section, Bacon, V.-C., has frequently permitted it, the trustees undertaking to hold the money on the trusts of the land purchased.

Disentailing deed.

Where the land taken was entailed some judges have allowed the purchase-money to be paid out to the tenant in tail without a disentailing deed, *Sowry* v. *Sowry*, 8 W. R. 339, where the money was under 200*l*. ; *Re South Eastern Railway Company*, 30 Beav. 215, where it was 1000*l*. ; and see *Re Tyler*, 8 W. R. 540 ; *Re Holden*, 1 H. & M. 445 ; *Notley* v. *Palmer*, 1 L. R. Eq. 241 ; *Ex parte Earl Abergavenny*, 19 Beav. 153 ; *Re Row*, L. R. 17 Eq. 300; but see *Re Butler's will*, L. R. 16 Eq. 479; and *Re Broadwood*, L. R. 1 Ch. Div. 438 ; *Re Wood*, 20 L. R., Eq. 372 ; and where the tenant for life was lunatic, the money was allowed to be laid out on permanent improvements, without requiring the remainderman to execute a disentailing deed, *Re Watson*, 4 N. R. 528, 10 Jur. N. S. 1011; and see Lewin, 692.

Payment to married woman without deed.

Where the land taken belonged to a married woman, the purchase-money may be paid to her husband upon her consent being taken in court (see *Gibbons* v. *Kibbey*, 10 W. R. 55), though it amounts to a disposition of land, without an acknowledged deed ; *Re Hayes*, 9 W. R. 763 ; *Re Worthington*, cited Seton, 660 ; *Re Tyler*, loc. cit. ; *Re Clarke*, 13 W. R. 401 ; *Knapping* v. *Tomlinson*, 5 W. N. 107 ; *Pollock* v. *Birmingham S. E. Ry.*, 13 W. R. 401.

To bishops.

As to the consent of Ecclesiastical Commissioners to petitions by bishops, see *Ex parte Bishop of London*, 12 D. F. J. 14 ; and Colleges, *Ex parte Rector of Twyford*, W. N. 1865, 126.

Payment to dowress, &c.

Payment of a third of the corpus to a dowress was allowed in *Re Hall*, 9 L. R. Eq. 179.

Questions of title.

As to the Court's power to decide questions of title, or the amount of the vendor's interest, see note to s. 79, p. 47, *post*.

Reinvestment in leasehold and copyhold.

In *Ex parte Bishop of London*, 2 D. F. J. 14, the buying up a lease of other land belonging to the see was held equivalent to a purchase of freehold within this clause (see note (*d*)). And the Court allowed the purchase-money of leaseholds to be invested in the purchase of a reversion in fee of other leaseholds belonging to the same parties (*Re Brasher's Trusts*, 6 W. R. 406), and proceeds of leaseholds in purchase of freeholds (*Re Parker*, 13 L. R. Eq. 495). See, also, *Re the Liverpool Docks Act*, 1 Sim. N. S. 202, where such purchase-monies were ordered to be laid out in the purchase of copyholds of inheritance. But generally the purchase-monies of copyholds and freeholds cannot be laid out in the purchase of leaseholds (*Ex parte Macaulay*, 2 W. R. 667). Under special circumstances, however, the reinvestment of the purchase-monies of freeholds, copyholds, and leaseholds, in the purchase of copyholds of inheritance, has been permitted (*Re Brown*, 6 Rly. Ca. 733, and see *Re Cann's Estate*, 15 Jur. 3, Seton, 1065), and in leaseholds where the freehold taken was not in settlement (*Re Rehoboth Chapel*, L. R. 19 Eq. 180). And as to the evidence required, see *Re Kinsey*, 1 N. R. 303.

Purchase of estates of greater value.

Where an advantageous opportunity offers itself for the investment of the monies paid in, together with other trust-monies, in the purchase of estates of greater value, the Court will sanction such investment (*Ex parte Newton*, 4 Y. & Coll. Ex. 518).

Reference to conveyancing counsel.

On application for reinvestment, the Court approves the value and form of investment, and generally postpones any further order till the opinion of the conveyancing counsel of the Court is obtained on the title, *Re Martin*, 17 Jur. 30 ; *Ex parte Churchwardens of Bicester*, 5 Rly. Ca. 205 ; *Ex parte Bouverie*, *ibid.* 431 ; see *Ex parte Lowe*, 19 L. T. 310 ; *Ex parte Duckle*, 16

Jur. 511 ; *Re Caddick*, 9 Ha. App. IX. But in *Re Hichin's Estate*, 1 W. R. 505, and *Ex parte Vicar of East Dereham*, 21 L. J. Ch. 67, orders were made for reinvestment in land of the money paid in, the title having been approved by counsel, see note to s. 11 of 19 & 20 Vict. c. 120 (Settled Estates Act), and see forms in Seton., and in 10 Hare, App. xxxvi., and reference to the conveyancing counsel may be dispensed with, see note to 15 & 16 Vict. c. 80, s. 40, *post*. 8 Vict. c. 18, s. 70. Prospective order.

(*g*) See *Clephane* v. *Magistrates of Edinburgh*, 4 Macq. 603 ; *Ex parte Thorner's Charity*, 12 L. T. 266 (1848) ; the provision of temporary buildings for the patients until a new hospital should be built was held a proper reinvestment of part of the purchase money of a hospital, in *Re St. Thomas' Hospital*, 11 W. R. 1018. Providing new buildings.

LXX. Such money may be so applied as aforesaid upon an order of the Court of Chancery* in England or the Court of Exchequer in Ireland, made on the petition (*h*) of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited ; and until the money can be so applied it may, upon the like order, be invested by the said Accountant-General* in the purchase of three per centum consolidated or three per centum reduced bank annuities, or in government or real securities (*i*), and the interest, dividends, and annual proceeds thereof (*k*) paid to the party who would for the time being have been entitled to the rents and profits of the land (*l*). Interim investment.

*See Judicature Act, 1873, s. 34 (2).

*See 35 & 36 Vict., c. 44, s. 4.

(*h*) Consol. Ord. XXXV., rule 1, as to applying in chambers for dividends payable on sums in court under 300*l*., does not apply to principal monies paid in under this Act (*Re Clarke's Devisees*, 6 W. R. 812). But in *Re the Dunraven Estates*, 10 W. R. 56 ; it was held that a petition for reinvestment might be amended at the hearing by asking that the balance might be invested in purchases to be approved by the judge in chambers, see *Re Trus. of Jolliffe's Charity*, 3 W. N. (1868) 56. Applications for interim investment, how made.

(*i*) The Court will sanction an *interim* investment in mortgage security, *Re Smith*, 9 L. R. Eq. 178, but not if the chief clerk has reported against it (*Ex parte Franklyn*, 1 De G. & Sm. 528). See now 23 & 24 Vict., c. 38, s. 10, *post*, and notes, as to the investment of cash under the control of the Court. This Act was held to apply to money in Court under this section, *Re Fryer*, L. R. 20 Eq. 468. What investment is allowed.

(*k*) Where the company are in possession, payment of the dividends to the tenant for life will be ordered before the conveyance (*Re Hungerford's Trusts*, 1 K. & J. 413). It is not the duty of the Court to go into the title of the person claiming. See sect. 79, *post*, p. 47. Dividends paid before conveyance.

As to the form of an order under this section in the case of a corporation sole, see *Ex parte the Archbishop of Canterbury*, 2 De G. & Sm. 365 ; and comp. *Re Davenant's Charity*, 2 W. R. 344, see *Re Pearce*, 24 Beav. 491 ; *Ex parte Churchwarden and Overseers of Bicester*, 5 Rly. Ca. 702, where the dividends were ordered to be paid "to the vicar for the time being, and churchwardens and overseer, or either of them." See *Re Collins' Charity*, 29 L. J. Ch. 168 ; *Re How*, 15 Jur. 266 ; *Re Brent*, 8 W. R. 270, and *Re Codrington*, 18 L. R. Eq. 658, where payment to the secretary of a charity was ordered, there being no treasurer. Corporation "for time being entitled."

8 Vict. c. 18, s. 71.

Who may apply for interim investment as "party entitled to rents and profits."

(*l*) It seems that the Court has not power to proceed under this section at the instance of an incumbrancer, or annuitant, but only at the instance of the person who would have been entitled to the rents and profits if the property had been unsold, *Ex parte Back*, 2 You. & Jer. 386 ; and see *Re Hungerford*, 3 K. & J. 455 ; *Ex parte Cofield*, 11 Jur. N. S. 1 ; *Re Wrey*, 11 Jur. N. S. 206 ; *Ex parte Wilkinson*, 3 De G. & S. 633. In *Re Pedley's Estate*, 1 Jur. N. S. 654, an order was made on the petition of the tenant for life, and annuitants (not bound by the contract) for payment of the dividends to the former, prefaced by an undertaking not to distrain on the lands. A remainderman though plaintiff in an administration suit was held to have no right to petition (*Nash* v. *Nash*, 37 L. J. N. S. 927).

Sums from 20*l.* to 200*l.* to be deposited or paid to trustees.

LXXI. If the purchase-money or compensation shall not amount to the sum of two hundred pounds and shall exceed the sum of twenty pounds, the same shall either be paid into the Bank, and applied in the manner hereinbefore directed with respect to sums amounting to or exceeding two hundred pounds, or the same may lawfully be paid to two trustees (*m*), to be nominated by the parties entitled to the rents or profits of the lands in respect whereof the same shall be payable, such nomination to be signified by writing under the hands of the party so entitled ; and in case of the coverture, infancy, lunacy, or other incapacity of the parties entitled to such monies, such nomination may lawfully be made by their respective husbands, guardians, committees, or trustees ; but such last-mentioned application of the monies shall not be made unless the promoters of the undertaking approve thereof and of the trustees named for the purpose ; and the money so paid to such trustees, and the produce arising therefrom, shall be by such trustees applied in the manner hereinbefore directed with respect to money paid into the Bank, but it shall not be necessary to obtain any order of the Court for that purpose.

Payment to trustees for time being, one of two trustees &c.

Charity Trustees.

(*m*) Where the land taken had been vested in trustees under the Municipal Corporation Acts, the Court, under this section, ordered payment of the dividends of the investment to any two of the trustees for the time being (*Re Collins' Charity*, 29 L. J. Ch. 168). In *Re Clinton*, 8 W. R. 492, followed in *Re Coulson*, 17 L. T. N. S. 27, V.-C. Wood, after consulting with the Registrars, made the order for payment to the two trustees "or either of them." The proceeds of the sale of charity lands taken by a railway company were paid to the trustees of the charity, with the consent of the Charity Commissioners (*Re Faversham Charities*, 10 W. R. 291), but see note at foot of p. 37, *ante*.

Sums not exceeding 20*l.* to be paid to parties.

LXXII. If such money shall not exceed the sum of twenty pounds (*n*), the same shall be paid to the parties

entitled to the rents and profits of the lands in respect whereof the same shall be payable, for their own use and benefit, or in case of the coverture, infancy, idiotcy, lunacy, or other incapacity of any such parties, then such money shall be paid for their use to the respective husbands, guardians, committees, or trustees of such persons. 8 Vict. c. 18, s. 73.

(*n*) Where it is probable that after re-investment of part of the sum paid in, the balance left will be under 20*l.*, the Court will order that the balance, *if less than* 20*l.*, be paid to the tenant for life (*Re Lord Egremont*, 12 Jur. 618 ; *Re Bateman's Estate*, 21 L. J. Ch. 691). But see *Ex parte Vicar of Bredicot*, 5 Rly. Ca. 209, where the Court refused to order payment of 20*l.* 10*s.* (the balance of 200*l.* paid into court for the purchase of land belonging to a rectory) to the rector in liquidation of extra costs beyond those allowed by the Act ; and in *Re Bateman*, 21 L. J. Ch. 691, and *Ex parte Barrett*, 19 L. J. Ch. 415, applications to allow sums over 20*l.* to be paid to the tenant for life, he undertaking to lay them out in lasting improvements, were refused. Purchase-money under 20*l.*

All sums payable under contract with persons not absolutely entitled to be paid into Bank.

LXXIII. All sums of money exceeding twenty pounds which may be payable by the promoters of the undertaking in respect of the taking, using, or interfering with any lands, under a contract or agreement with any person (*o*) who shall not be entitled to dispose of such lands or of the interest therein contracted to be sold by him absolutely for his own benefit, shall be paid into the Bank or to trustees in manner aforesaid ; and it shall not be lawful for any contracting party not entitled as aforesaid to retain to his own use any portion of the sums so agreed or contracted to be paid for or in respect of the taking, using, or interfering with any such lands, or in lieu of bridges, tunnels, or other accommodation works, or for assenting to or not opposing the passing of the bill (*o*) authorising the taking of such lands, but all such monies shall be deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in remainder, reversion, or expectancy : Provided always, that it shall be in the discretion of the Court of Chancery in England, or the Court of Exchequer in Ireland, or the said trustees, as the case may be, to allot to any tenant for life or for any other partial or qualified estate, for his own use, a portion of the sum so paid into the Bank or to such trustees as aforesaid, as compensation for any injury, inconvenience,

8 Vict. c. 18, s. 74.

or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works (*p*).

Section applies though no contract.

(*o*) These words were held to apply to the case of a landowner withdrawing his opposition to the bill authorising a railway, though he never entered into any contract as to the land eventually taken under the Act, and though the section in terms only speaks of a "contracting party," *Pole* v. *Pole*, 2 Dr. & Sm. 420.

What monies are within the section.

(*p*) Costs and expenses incurred by a tenant for life which the company are not bound to pay may be, under this section, ordered to be paid to the tenant for life, out of the purchase-money paid in (*Re Aubrey*, 1 W. R. 464, 17 Jur. 874; see *Earl of Shrewsbury* v. *N. Staffordshire Ry. Co.*, 1 L. R. Eq. 593; *Re Oldham*, W. N. (1871) 190; *Re Strathmore Estates*, L. R. 18 Eq. 338).

Small sums ordered to be paid to tenant for life.

Under this section small sums will be ordered to be paid to the tenant for life, for his own use, as compensation for "injury, inconvenience, and annoyance," sustained by him, see *Ex parte Lockwood*, 14 Beav. 158, note. But in *Re Duke of Marlborough Estates*, 13 Jur. 738, a company having agreed with a tenant for life, to pay him a sum for the benefit of himself, "or other the owner for the time being, for indemnifying him from the expenses of making a new road, &c., and as a compensation for the annoyance which he, or such owners as aforesaid, might sustain, in consequence of the construction of such railway," the Court ordered the purchase-monies', after payment of the costs for making the road, to be invested, and refused to pay them to the tenant for life.

Damage.

It was held that upon a reference to the master, under the old practice, to inquire as to the title to money paid in for compensation for damage done to lands, the master ought to report whether the damage done be temporary or permanent (*Cator* v. *Croydon Canal Company*, 4 Y. & Coll. Exch. Rep. 405). See further as to claims by the tenant for life under this sect. *Re Sir Thomas Maryon Wilson*, 32 L. J. Ch. 191, on appeal from 2 J. & H. 619.

Court of Chancery may direct application of money in respect of leases or reversions as they may think just.

LXXIV. Where any purchase-money or compensation paid into the Bank under the provisions of this or the special Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland, on the petition of any party interested in such money to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which

such money shall have been paid, or as near thereto as may be (*q*). 8 Vict. c. 18, s. 75.

(*q*) "Lease" includes an agreement for a lease (sect. 3).

Apportionment—

As to apportionment between lessor and lessee, where there is a doubt on the title of either, see *Brandon* v. *Brandon*, cited in note to sect. 79, *post* p. 47, and *Re Wood*, *infra*.

(1) As between lessor and lessee.

A yearly tenant holding over after notice to quit can claim no compensation, *Ex parte Nadin*, 17 L. J. Ch. 421. Lessors and lessees should deal separately with the company in respect of their interests, for the Court has no jurisdiction to apportion the purchase-money between them, *Ex parte Ward*, 2 De G. & S. 4. See *Ex parte Dean of Battel*, 21 L. T. 55 (1853).

(2) As between successive owners.

When property *held under a lease* is taken, so that the present income of the purchase-money is less than the annual profits of the land, it often becomes a question between a tenant for life and remainderman how the purchase money is to be divided. The tenant for life was allowed the full income he received before the sale in *Jeffreys* v. *Connor*, 23 Beav. 328, and the same was held with respect to an annuitant in *Ex parte Wilkinson*, 3 De G. & Sm. 633 ; In *Re Money*, 2 Dr. & Sm. 94 ; *Re Treacher*, 18 L. T. N. S. 810, and *Littlewood* v. *Pattison*, 10 Jur. N. S. 875 ; the entire purchase-money was divided by the number of years the lease had to run, and a portion paid each year to the tenant for life ; but *Re Money* was disapproved of, and the proportions referred to an actuary in *Re Chamberlain*, 10 Sol. Jour. 910 ; *Re Phillips*, 6 L. R. Eq. 250 ; see *Re Birch*, 10 Jur. N. S. 673 ; *Re Pfleger*, 6 L. R. Eq. 426 ; *Re North*, W. N. 1868, 148.

(*a*) Where the property taken was *held on lease*, and therefore of perishable nature.

Property held on renewable leases.

For the principle on which the Court will estimate the value of a lease held on a contingency, see *Penny* v. *Penny*, 5 L. R. Eq. 227 ; and as to cases where questions arise between lessor and lessee, *e.g.*, in respect of right to renewal, see note to *Re Wood*, 10 L. R. Eq. 572, where the renewal of a lease formerly renewable, was refused, and the tenant for life was allowed only the income of the purchase-money. In this case, *Morres* v. *Hodges*, 27 Beav. 625, and *Tardiff* v. *Robinson*, *ibid.* 629, were considered. Where trustees have neglected to renew a renewable lease which therefore determined in the lifetime of the tenant for life thereof under a settlement, such tenant for life was allowed the whole of the purchase-money, *Stuart*, V.-C., declining to consider, on petition, the question of breach of trust in not renewing, *Re Beaufoy*, 1 Sm. & Giff. 20.

Refusal to renew.

(*β*) Where property was let on leases, renewable on fines.

On the other hand, where property is let on renewable leases at a low rent the present income of the purchase-money will exceed the rent reserved, and, in such cases, the Court generally allows the persons entitled in possession so much of the dividends of the purchase-money as corresponds with the amount they would have received if the land were unconverted, and directs the surplus to be accumulated and invested, with liberty to apply at the periods when the leases would be renewable and the fines payable, *Ex parte Dean of Gloucester*, 19 L. J. Ch. 400 ; *Ex parte Dean of Christchurch*, 23 L. J. Ch. 149 ; *Ex parte Vicar of Lambeth*, 4 Rly. Ca. 231 ; *Ex parte Bishop of Winchester*, 10 Hare, 137 ; *Ex parte Precentor of St. Paul's*, 1 K. & J. 538 ; *Ex parte Dean of St. Pauls*, 11 W. R. 482 (which were all cases of ecclesiastical or college leases ; *Re Wootton*, 1 L. R. Eq. 589 ; *Re Mette*, 7 L. R. Eq. 73 (which were cases of private property) ; but the whole dividends have, under special cases, been allowed to the persons entitled in possession ; *Re Dean and Chapter of Westminster*, 26 Beav. 214 (where the present value of the property taken was largely increased since the leases were granted) ; *Ex parte Trustees of St. Thomas's Church, Bristol*, 5 W. N. (1870) 192 ; *Re Stewart*, 1 Drew. 636.

When whole dividends allowed.

See note to section 80, p. 48, *post*, as to the costs of remaindermen appearing upon petitions under this section.

LXXV. Upon deposit in the Bank in manner hereinbefore provided of the purchase-money or compensation

Upon deposit being made the owners of

8 Vict. c. 18, s. 75.

the lands to convey, or in default the lands to vest in the promoters of the undertaking, upon deed poll being executed.

agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, the owner (*r*) of such lands, including in such term all parties by this Act enabled to sell or convey lands, shall, when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof (*s*), or if he fail to adduce a good title to such lands to their satisfaction, it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation under the hands and seals of the promoters or any two of them, containing a description of the lands in respect of which such default shall be made, and reciting the purchase or taking thereof by the promoters of the undertaking, and the names of the parties from whom the same were purchased or taken, and the deposit made in respect thereof, and declaring the fact of such default having been made; and such deed poll shall be stamped with the stamp duty which would have been made payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of or capable of being sold and conveyed by the party between whom and the promoters of the undertaking such agreement shall have been come to, or as between whom and the promoters of the undertaking such purchase-money or compensation shall have been determined by a jury or by arbitrators or by a surveyor appointed by two justices as herein provided, and shall have been deposited as aforesaid, shall vest absolutely in the promoters of the undertaking, and as against such parties, and all parties on behalf of whom they are hereinbefore enabled to sell and convey, the promoters of the undertaking shall be entitled to immediate possession of such lands (*t*).

(*r*) As to the meaning of "owner," see next section and note.

(*s*) See, before the passing of the Act, *Bruce* v. *Willis*, 11 Ad. & Ell. 463; s. c. sub nom. *Bath River Company* v. *Willis*, 2 Rly. Ca. 7; *The Earl of Harborough* v. *Shardlow*, 2 Rly. Ca 253; 7 M & W. 87.

Vesting.

(*t*) The lands vest without a conveyance, *Bruce* v. *Willis*, loc. cit.

8 Vict. c. 18, s. 76.

Where parties refuse to convey, or do not show title, or cannot be found, the purchase-money to be deposited.

LXXVI. If the owner (*u*) of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot, after diligent inquiry, be found, or fail to appear on the inquiry before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank, in the name, and with the privity of the Accountant-General * of the Court of Chancery in England or the Court of Exchequer in Ireland, to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them, so far as the promoters of the undertaking can do), subject to the control and disposition of the said Court.

*See 35 & 36 Vict. c. 44, p. 4.

Who is "owner" (see s. 79).

(*u*) A person in possession, but showing a bad title, is not "an owner" within this section; and therefore, where a vendor under a contract for a sixty years' title, fails to show more than a title for thirty-six years, he cannot compel the company to deposit the purchase-money in the Bank under this section (*Douglas* v. *London and North-Western Railway Company*, 3 K. & J. 173; and see *Ex parte Freeman and Stallingers of Sunderland*, 1 Drew. 184; *Doe* d. *Hutchinson* v. *Manchester, Bury, and Rosendale Railway Company*, 14 M. & W. 687; 3 Rly. Ca. 748). But a surviving partner selling the property by virtue of his duty to wind up the partnership, is an owner within the section (*Douglas* v. *London and North-Western Railway Company, ubi. sup.*). Comp. as to the meaning of the word owner, *Russell* v. *Shenton*, 3 Q. B. 449; *Chauntler* v. *Robinson*, 4 Exch. 163; other cases quoted in note (*b*) to s. 79, *infra*.

Upon deposit being made a receipt to be given, and the lands to vest upon a deed poll being executed.

LXXVII. Upon any such deposit of money as last aforesaid being made, the cashier of the Bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall

8 Vict. c. 18, s. 77.

have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll, under their common seal, if they be a corporation, or if they be not a corporation under the hands and seals of the said promoters or any two of them, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which and the names of the parties to whose credit such deposit shall have been made, and such deed poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase-money or compensation shall have been deposited shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands.

Application of monies so deposited.

LXXVIII. Upon the application by petition (*x*) of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been deposited, or any part of such lands, or any interest in the same, the said Court of Chancery * in England or the Court of Exchequer in Ireland may, in a summary way, as to such Court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof (*y*), and may make such other order in the premises as to such Court shall seem fit (*z*).

*See Judicature Act, 1873, s. 34 (2).

Suit by owners.

(*x*) Where the company alleged that the owners failed to make a title, and paid the purchase money into court under sect. 76, and the owners obtained a decree for completion of the purchase in a suit, the order for payment out under this section was made on a petition entitled in the suit and in the matter of the Act, *Galliers* v. *Metropolitan Railway*, 11 L. R. Eq. 410.

Payment to incumbrancers.

(*y*) Under this section incumbrancers may petition for the money to be paid to them out of court, *Re Marriage*, 9 W. R. 843.

Conversion into personalty.

(*z*) Purchase-money in court, under this section, is converted into personalty, the vendors from whom the land is taken being competent to convey, *Ex parte Flamank*, 1 Sim. N. S. 260; *Ex parte Harrop*, 3 Drew. 726,

733; *Ex parte Hawkins*, 13 Sim. 569; and see note (*a*) to sect. 69, *ante*, p. 36. See, however, *Re Walker's Estate*, 22 L. J. Ch. 888. 8 Vict. c. 18, s. 79.

Party in possession to be deemed the owner.

LXXIX. If any question arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary be shown to the satisfaction of the Court (*a*), and unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly (*b*).

(*a*) See *Ex parte Webster*, W. N. 1866, 246.

Party in possession.

(*b*) "The legislature has anxiously provided that the Court shall not upon the occasion of applications for payment of purchase-money, deal with the property in any way which can affect the title, unless it can be shown so clearly as to be beyond all question, that there must be litigation upon the question of title." Per V.-C. Wood in *Re St. Pancras Burial Ground*, 3 L. R. Eq. 173, 183; and compare *Re Perry*, 1 Jur. N. S. 917; *Re Sterry*, 3 W. R. 561; *Re Alston*, 5 W. R. 189.

When the Court will refuse to investigate title of party in possession.

But where the title is proved to be doubtful, the Judge is bound to try the question, as formerly the Court would have directed an issue at law, see *Ex parte Issanchaud*, 3 Y. & Coll. Exch. 721; *Ex parte the Freemen, &c., of Sunderland*, 1 Drew. 184; and *a jury* in trying such question ought not to deem the party in possession the owner under this section, which "was intended only as a direction to *the Court*, how it should act in cases where upon application for money deposited it should be unable to arrive at a satisfactory conclusion as to what parties were lawfully entitled to the land." Per V.-C. Kindersley, *ibid.*, p. 191. Where successive interests were claimed, and there was a dispute whether one of the claimants was really entitled, the Court would apply its ordinary machinery to ascertain the respective values of the particular interests, and after paying the amount of the value of the interests as to which there was no doubt to the parties entitled, would return the remainder of the money to the company, *Brandon* v. *Brandon*, 2 Dr. & Sm. 305; *Re N. London Railway Company*, *ibid.* 312; *Re Perks*, 1 Sm. & Giff. 545; *Re Hayne*, 13 W. R. 492; see *Bogg* v. *Midland Railway*, L. R. 4 Eq. 311.

What rights will be determined.

Where title to *part* is disputed.

Costs in cases of money deposited.

LXXX. (*c*) In all cases of monies deposited in the Bank under the provisions of this or the special Act or an Act incorporated therewith (*d*), except where such monies shall have been so deposited by reason of the wilful refusal (*e*) of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same

8 Vict. c. 18, s. 80.

shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto to be paid by the promoters of the undertaking (*f*) (that is to say), the costs of the purchase or taking of the lands or which shall have been incurred in consequence thereof (*g*) other than such costs as are herein otherwise provided for, and the costs of the investments of such monies in government or real securities (*h*), and of the reinvestment (*i*) thereof in the purchase of other lands, and also the costs of obtaining the proper orders (*k*), for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out (*l*) of court of the principal of such monies or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants (*m*): Provided always, that the costs of one application only for reinvestment in land shall be allowed, unless it shall appear to the Court of Chancery in England or the Court of Exchequer in Ireland, that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking (*n*).

Costs payable by company.

(*c*) As the section applies to cases where the company uses its *compulsory* powers either under the preceding sections, or under sect. 85 (*post*), see *Ex parte Flower*, 1 L. R. Ch. 599, the Court inclines in doubtful cases under it, to make the company pay the costs, *Ex parte Marshall*, 1 Phill. 560.

The costs payable by the company (or *companies*, see note (*f*)) may be divided into—

(1) Costs of the *purchase* and *consequential* thereon, see note (*g*).

(2) Costs of interim investment in government or real securities, see note (*h*).

(3) Costs of *reinvestment and payment out*, including successive partial investments or abortive attempts to invest, see notes (*i*) and (*t*).

(4) Costs of *orders*, see note (*k*).

(5) Costs of "*proceedings relating thereto*," including costs arising from the land taken being *subject to suits*, or to *incumbrances*, or belonging to *persons under disability*, see note (*k*) and (*m*).

As to the costs under special Acts, see note (*d*) *infra*.

7 & 8 Vict. c. 18, s. 80.

The Court refused to declare that the landowner had a vendor's lien in respect of the costs, *Earl Ferrers* v. *Stafford and Uttoxeter Railway*, 20 W. R. 478.

No vendor's lien for costs.

The Court has a discretion as to the costs even of a petition for payment out, and if the landowner has put the company to unreasonable expense may disallow him his costs, *Re Marylebone Improvement Act*, 19 W. R. 1058.

Discretion of Court.

Where, *by arrangement*, a landowner was to be paid principal, interest, and costs, the taxing-master was directed to allow all reasonable costs incurred by the vendor before the Parliamentary Committee, *Cooper* v. *L. C. & D. Railway Company*, 17 L. T. 283.

Arranged costs.

When a company was insolvent, and the vendor was entitled for life only as rector, his costs were ordered to be paid out of the purchase-money, *Re Glebe Lands of Great Yeldham*, L. R. 9 Eq. 68.

When purchase-money paid into court has once been carried to a new account not entitled in the matter of the Lands Clauses Act, the company ought not to be served with a petition for payment out, and cannot be made to pay costs, *Brown* v. *Fenwick*, 14 W. R. 257; *Prescott* v. *Wood*, 27 L. J. Ch. N. S. 691; *Fisher* v. *Fisher*, L. R. 17 Eq. 340; see *Re Bagot*, 14 W. R. 471; and notes at head of p. 55, *post*.

Where no jurisdiction.

(*d*) For the meaning of "*the* special Act," see sect. 2, *supra*, p. 32. The Lands Clauses Act is held to be "incorporated" with all *subsequent* acts, authorising the taking of lands, *Ex parte Vicar of St. Sepulchre's*, 12 W. R. 499, unless such subsequent Act contains provisions inconsistent with such incorporation, *Re Cherry's Estates*, 10 W. R. 305; *Re St. Katherine's Dock Company*, 14 W. R. 978. Where a special Act was repealed and re-enacted by a new Act, with which was incorporated the Lands Clauses Act, the special Act was held to be incorporated with the Lands Clauses Act, *Re Ellison*, 8 D. M. G. 62; see *Re Holden*, 1 Jur. N. S. 995; *Re Shuttleworth*, 4 Giff. 87.

"Special Act." "Incorporated therewith."

In cases where a special Act was dated before, and has *not* been *incorporated* with the Lands Clauses Act, it was the practice of the Court of Exchequer to make the company pay costs, whether they were given by the special Act or not, see *Re Robertson*, 23 Beav. 433; *Re Tiverton Market Company* (No. 2), 26 Beav. 239; *Re Gould*, 24 Beav. 442.

Practice under special Acts.

But the Court of Chancery was more strict, and held that the company need only pay such costs as were provided for by their special Act; *Re Land's Trust*, 4 K. & J. 81, and cases there cited; *Ex parte Ecclesiastical Commissioners*, 13 W. R. 575; *Re Metford*, 8 W. R. 634; *Re Musgrave*, 6 Jur. N. S. 797; *Re Acker*, 11 W. R. 182; *Mitchell* v. *Newell*, 3 Rly. C. 315; *Ex parte Cooke*, 7 Jur. 639; *Re Allen*, 2 W. N. (1867) 11; *Ex parte Bishop of London*, 8 W. R. 465, 714; *Re Bagot*, 10 W. R. 607; *Re Ballinrove Workhouse*, 15 W. R. 978; *Re Byron*, 4 D. M. G. 649; in *Re Edmeade*, 6 Jur. N. S. 986, the Act provided only for the costs of petitions to reinvest in land, but the corporation taking the land had to bear costs of petitions simply for payment out, and see *Re Toft*, 2 Jur. N. S. 131; in *Re Saunders*, L. R. 8 Eq. 681, V.-C. James made the company pay costs of a petition for payment out, the special Act providing only for the payment of the expenses of *purchase*; and see *Re Spitalfield's School*, 10 L. R. Eq. 671, 18 W. R. 799; but in *Re Harrison*, 10 L. R. Eq. 532; *Re Williams*, 12 L. R. Eq. 488, *Re Charity Schools of St. Dunstan in the West*, 12 L. R. Eq. 537, *Re Lord Stanley of Alderley's Estate*, L. R. 14 Eq. 227, the cases putting a liberal construction on the Act were not followed.

Costs according to the Act.

(*e*) For cases of doubt, whether the refusal is wilful, see *Re Jones*, 4 Jur. N. S. 581; *Ex parte Marshall*, 1 Phil. 560. A *wilful refusal* means a capricious refusal; and a reasonable objection, though ultimately overruled, is not a wilful refusal within the section, see *Ex parte Bradshaw*, 16 Sim. 174, followed in *Re Windsor Railway*, 12 Beav. 522, and *Ex parte Railston*, 15 Jur. 1028, where the landowner was advised that notice had not been properly served on him, and in *Ex parte Dashwood*, 3 Jur. N. S. 103, where the landowner had been advised by counsel that the company had no right to take his land. Where a vendor cannot make a clear title by reason

What is not a wilful refusal.

7 & 8 Vict. c. 18, s. 80.

of his not having paid off incumbrances of a larger amount than the land taken, he is clearly not guilty of a "wilful refusal," *Re Diver*, 1 Jur. N. S. 995.

What is a wilful refusal.

But where a vendor insisted upon payment, not only of the purchase-money, but of his costs also, before he gave up possession, and the company consequently paid the purchase-money into the bank under the 76th section of the Act, V.-C. Wood, on a petition to obtain payment out of the money, held that the vendor had been guilty of "wilful refusal," and had thus disentitled himself to receive costs, *Re Turner's Estate*, 10 W. R. 128. In another similar case a petition by the vendor praying costs against the company, was dismissed *with costs*, *Ex parte Hyde*, cited in Seton on Decrees.

Where several companies paid in purchase money.

(*f*) Where the funds in court to be dealt with by the petition come from several companies, or include settled funds coming from other sources (*Re Power*, W. N. (1876) 205) each company will bear a proportionate share of the costs, *Re Manchester & Leeds Railway*, L. R. 2 Ch. Div. 360, where Jessel, M. R., declined to follow, *Re Maryport Railway*, 32 Beav. 397. If the petition is for reinvestment, the costs of the *ad valorem* stamp on the conveyance or of the surveyor's fee will be borne rateably according to the amount contributed by each to the purchase-money, *Ex parte Bishop of London*, 2 D. F. J. 14; see *Re Byron*, 1 D. J. S. 358; *Re Merton College*, 33 Beav. 257; *Re Carlisle, &c., Railway Company*, *ibid.* 253, 1 D. J. S. 358; *London and Brighton Railway* v. *Shropshire Railway*, 23 Beav. 605; *Ex parte the Corporation of London*, 5 L. R. Eq. 418; *Ex parte Dean of Christ Church*, W. N. (1872) 201; *Re Leigh*, 6 L. R. Ch. 887, 893. In cases where the amounts paid in by the different companies were very unequal, *Re Byron*, loc. cit., *Ex parte Governors of Christ's Hospital*, 2 H. & M. 166, *Ex parte Governors of St. Bartholemew's Hospital*, 20 L. R. Eq. 369, the costs have been borne proportionately.

In dividing the costs, companies who have amalgamated since the land was taken were treated as separate companies, *Re Maryport Railway*, 32 Beav. 397, but see *Ex parte Corpus Christi College*, 13 L. R. Eq. 334.

The landowner ought to present one petition only for payment out, or reinvestment of the money paid in by the several companies, *Ex parte Lord Broke*, 11 W. R. 505.

When funds are in different branches of the Court.

Where two funds paid into Court had been dealt with by different branches of the Court, and it was desired to deal with both funds at the same time, leave was given to present one petition in both matters in one branch of the Court without transferring either of the matters, *Re Lord Arden*, 10 L. R. Ch. 445. See, too, *Re Butterfield*, 9 W. R. 805; *Re Gore Langton*, 10 L. R. Ch. 328.

Costs of purchase or taking.

(*g*) The costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, include the costs of ascertaining the value of the land conveyed, *e.g.*, by appointment of ground-rents, *Re London, Brighton, &c., Railway Company, Ex parte Flower*, L. R. 1 Ch. 599 (*secus* in cases where the purchase is not compulsory, see note (*p*), p. 57).

Costs of conveyance.

They also include costs of a power of attorney from parties abroad, *Re Godley*, 10 Ir. Eq. Rep. 222; *Ex parte Incumbent of Guilden Sutton*, 8 D. M. G. 380, and costs of conveyance generally. As to costs of taking lands which are the subject of a suit, see notes at head of p. 53, *infra*.

Costs of interim investment.

(*h*) The costs of interim investment include the broker's commission, *Ex parte Corporation of Trinity House*, 3 Hare, 95; *Ex parte Braithwaite*, 1 Sm. & Giff. App. xv.

The costs of several interim investments in stock are allowed against the company, *Re Liverpool Railway Company*, 17 Beav. 392; *Reading* v. *Hamilton*, 5 L. T. N. S. 628; *Ex parte Eton College*, 15 Jur. 45; but see *Ex parte Taylor*, 1 Y. & Coll. Exch. 229; *Ex parte Hirst*, 4 Y. & Coll. 468; *Re Gould*, 24 Beav. 442. In *Re Lomax*, 34 Beav. 295, on application for investment on a mortgage security, it was ordered that the company should pay the costs of such investment, but as there had already been one interim investment in consols (all that the section allows in ordinary cases) it was held that the investment on mortgage security must, in regard to future costs, be treated as a permanent investment, and this case was followed in *Re Wilkinson*, 16 W. R. 637; *Re Flemon*, 10 L. R. Eq. 612; see, however,

Re Blythe, L. R. 16 Eq. 468, where the Court refused to make any declaration as to the permanency of the investment. 7 & 8 Vict. c. 18, s. 80.

The costs of, and incident to, the payment of the dividends must be paid by the company, *Ex parte Incumbent of Guilden Sutton*, 8 D. M. G. 380; *Ex parte Eccles. Commissioners*, 39 L. J. Ch. N. S. 623 (*Re Althorpe*, 3 Y & Coll. 396, contra, was decided on the construction of a special Act). Costs of and incident to payment of dividends.

So where the purchase-money of leaseholds was invested in consols, and the dividends thereon did not amount to the rents previously payable, so that yearly sales were necessary in order to satisfy the tenant for life (see note (*q*), p. 43), the costs of such sales were held to be payable by the company, *Re Long*, 1 W. R. 226; *Ex parte Edmunds*, 14 W. R. 507.

As to the costs of the petition for payment of dividends to persons successively entitled see *Re Jolliffe*, 9 L. R. Eq. 668, and other cases in note (*k*), *infra*.

(*i*) The section provides that the company shall pay the costs of the *reinvestment*, in cases where the reinvestment is in lands or hereditaments, *Re Lathropp's Charity*, L. R. 1 Eq. 467; for if a company, acting under its compulsory powers, deprives a man of his land, it is bound, at its own cost, to place him in possession of land of equal value, *Ex parte Rector of Holywell*, 2 Dr. & Sm. 465. But the section does not provide that when the purchase-money is applied in any of the other modes authorised by the 69th section, the company shall pay any costs other than those of the petition, and, accordingly, the costs of applying the purchase-money in discharge of incumbrances have been held not to be payable by the company, *Ex parte Corporation of Sheffield*, 21 Beav. 162; *Ex parte Town Trustees of Sheffield*, 8 W. R. 602; *Ex parte Earl of Hardwicke*, 17 L. J. Ch. 422; *Re Yeates*, 12 Jur. 279; but the contrary was held in *Ex parte Trafford*, 2 Y. & Coll. Exch. 522; *Ex parte Bishop of London*, 2 D. F. J. 14; and see *Re London & South Western Railway Act*, 2 J. & H. 390; and the costs of proceedings to redeem the land tax were ordered to be paid by the company in *Re London & Brighton Railway Company*, 18 Beav. 608; *Ex parte Beddoes*, 2 Sm. & Giff. 466; *Re Bethlehem Hospital*, 19 L. R. Eq. 457. Costs of *reinvestment* in land; in redeeming incumbrances or land tax.

The company have had to pay the following costs under the head of *costs of reinvesting the purchase money in other lands.* What are costs of *reinvesting in land.*

Costs of enrolling a purchase deed, *Re Governors of Christ's Hospital*, 12 W. R. 669.

Of referring the title to the conveyancing counsel of the court (*ante*, p. 38), *Re Morgan Jones*, 6 W. R. 762.

Of a second petition rendered necessary by the lands selected for reinvestment being the subject of a chancery suit, *Carpmael* v. *Profit*, 17 Jur. 875, 23 L. J. N. S. 165; but see *infra* as to special costs of purchase.

Of a petition under the Trustee Act rendered necessary by the death of the vendor leaving an infant heir, *Re Lowry*, L. R. 15 Eq. 78. See cases cited p. 57, *post*. Petitions under Trustee Act, &c.

But not the costs of the vendor's appearance on the petition, *Re Dyler*, 1 Jur. N. S. 975.

Nor the fine payable on a reinvestment in purchase of copyholds, the fine being part of the purchase-money, *Ex parte Vicar of Sauston*, 6 W. R. 492.

The company is liable to pay the costs of reinvestment in land, even where a person who has become absolutely entitled to the money asks for such reinvestment, *Re Jones*, 39 L. J. Ch. N. S. 190; *Re Dodd*, W. N. (1871) 83. See *Re Parker*, 20 W. R. 289; *Re Bagot*, 14 W. R. 471; *Re Pick*, 10 W. R. 365; *Re Lye*, 1 W. N. (1866) 20; and where a person absolutely entitled to the money died, having resettled it, the company had to pay the costs of reinvestment in land, to be settled to the uses of the will, *Re Benyon De Beauvoir*, 2 D. F. J. 5, 8 W. R. 425. Costs where reinvestment in land is asked for by person absolutely entitled.

When the money is sought to be reinvested in land upon a contract which throws upon the purchaser costs of the purchase, which in an open contract would be borne by the vendor, the costs directed to be paid by the company will be limited to those which in an open contract would be purchaser's costs, *Ex parte Governors of Christ's Hospital*, L. R. 20 Eq. 605. Special costs of purchase.

7 & 8 Vict. c. 18, s. 80.

The costs of reinvestment in the purchase of other lands may include the costs of successive reinvestments, and of *bonâ fide* but abortive attempts to reinvest.

Costs of successive reinvestments.

The costs of three successive reinvestments in land were ordered to be paid by the company in *Re St. Katharine's Dock Company*, 3 Rly. Ca. 514; and see *Jones* v. *Lewis*, 2 M. & G. 163; *Re Merchant Tailors' Company*, 10 Beav. 485; *Ex parte Trustees of St. Batholomew's Hospital*, 4 Drew. 425; *Ex parte Eton College*, 3 Rly. Ca. 271; *Ex parte Bouverie*, 4 Rly. Ca. 229; *Re Hereford, &c., Railway Company*, 13 W. R. 134; *Ex parte Rector of Loughton*, 5 Rly. Ca. 592 (where the company had to pay the costs, though 6*l.* only was invested in the second purchase); *Re Brandon*, 2 Dr. & Sm. 166; *Ex parte Fishmongers' Company*, 11 W. R. 81; but where the greater part of a sum in Court was invested on one petition, it was ordered that the petitioner should apply in chambers for the reinvestment of the balance, *Re Dunraven Estates*, 10 W. R. 56; and in another case the balance was paid out to trustees under the 71st section, *Re Kinsey*, 1 N. R. 303.

In redemption of land tax.

Land having been purchased out of money in Court, an application was made for reinvestment of a further sum in redemption of the land-tax, and the company paid the costs, *Re London and Brighton Railway*, 18 Beav. 608.

The Court refused to annex to its order any condition as to future costs, *Re Blythe*, L. R. 16 Eq. 468; *Re Sewart*, L. R. 18 Eq. 278.

Of attempts to reinvest.

Where attempts not authorised by the Court to reinvest in land fail by reason of the Court's disapproval or otherwise, the company does not pay the costs, but where the Court has approved, and the purchase goes off for other reasons, the company pays the costs of the *bonâ fide* attempt, *Ex parte Rector of Holywell*, 2 Dr. & Sm. 463; *Re Carney*, 28 W. R. 407; see *Ex parte Copley*, 4 Jur. N. S. 297; *Ex parte Eton College*, 7 W. R. 710; *Re Macdonald*, 6 Jur. N. S. 865, 2 L. T. N. S. 168; *Ex parte Stevens*, 15 Jur. 243; *Re Hardy*, 18 Jur. 370; *Re Woolley*, 1 W. R. 407, 465; *Re Vawdry*, 3 Giff. 224; *Ex parte Pumfrey*, 4 Rly. Ca. 490; *Ex parte the Manchester Burial Board*, W. N. (1866) 117.

Costs of obtaining the orders.

(*k*) The costs of the petition may be directed to be paid by the company (but as to the discretion of the Court, see *Re Marylebone Improvement Act*, 19 W. R. 1058) in the following cases:—

For reinvestment.

If the petition is for reinvestment, and that not merely strict reinvestment in land, but also in any of the modes allowed by the Court under section 95, see *Re Lathropp's Charity*, 1 L. R. Eq. 467, where *Re Bucks Railway*, 14 Jur. 1065, and *Re Oxford, &c., Railway*, 27 Beav. 571, were reviewed.

For payment of dividends to persons entitled.

If the petition is for *payment of the dividends* of an interim investment, it is decided that though there has been a petition for interim investment and payment of dividends to one tenant for life, the company must bear the costs of a new petition presented on the death of such tenant for life for payment of further dividends to the person subsequently entitled, *Re Jolliffe*, 9 L. R. Eq. 668 (where *Ex parte Incumbent of Guilden Sutton*, 8 D. M. G. 380, was referred to); see *Re Lye*, 1 W. N. (1866) 20; *Re Byrom*, 5 Jur. N. S. 261; but the company had not to pay the costs of a petition for payment of dividends to new trustees of a settlement, where the original petition was defective, *Re Pryor*, W. N. (1876) 141; see, however, as to the costs of defective and unnecessary petitions, notes on p. 54, *post*.

For payment out.

If the petition is for *payment out* to the person absolutely entitled, then if the land belongs to several persons, though their interest is derived under the same will, they may each present a petition; but if two or more appear by one solicitor, they will only have one set of costs, *Re Nicholl*, W. N. (1866) 93.

Costs of orders and proceeding relating thereto.

The company must pay the costs not only of obtaining the orders, but of *proceedings relating thereto except those* caused by litigation between adverse claimants (as to which see note (*m*)).

Costs of references in a suit.

Thus where the lands taken are the subject of a suit pending in Chancery, the object of the suit not being litigation, but merely administration, or some similar proceeding under the direction of the Court, the company will have to pay the costs of reference therein necessitated by the purchase, *e.g.*, for ascertaining the most beneficial course for persons under

disability, *Picard* v. *Mitchell*, 12 Beav. 486 ; *Haynes* v. *Barton*, 1 Dr. & Sm. 483 ; *Henniker* v. *Chafy*, 28 Beav. 621, 625, and *Re Walker*, 7 Rly. Cases, 129 ; *Re Taylor*, 1 Mac. & G. 210 ; *Re Hore's Estate*, 5 Rly. Cases, 592 ; *Re Hull and Selby Railway Company*, *ibid.* 458 ; *Re Merchant Tailors' Company*, 10 Beav. 485 ; but see *Re London and South Western Railway Act*, 11 W. R. 54 ; reversing s. c. 2 J. & H. 390, which, however, was a case of contract ; and compare *Ex parte Palmer*, 13 Jur. 781, and cases cited as to litigation between adverse claimants, *infra*, note (*m*).

References in lunacy.

Where lands belonging to a lunatic were taken, and the next of kin attended inquiries into the propriety of investment, &c., their costs were held payable by the company, *Re Briscoe*, 2 D. J. S. 249 ; and see *Re Taylor* and *Re Walker*, *ubi sup.*

Costs of service on and appearance of parties to a suit.

It seems that the company is not liable to pay costs of the appearance of parties to the suit, where the object of the application is merely to *transfer* a fund, paid into court under the Act, to the credit of the cause ; for then, the other parties to the cause need not be served, and should not appear, *Eden* v. *Thompson*, 2 H. & M. 6 ; and see *Melling* v. *Bird*, 2 W. R. 219 ; *Haire* v. *Lovitt*, 12 L. J. 306. In *Sidney* v. *Wilmer*, 31 Beav. 338 (an earlier case than *Eden* v. *Thompson*), on a petition to transfer the fund to the credit of the cause, and to accumulate dividends, the company were held bound to pay the costs of serving the parties to the suit made respondents, but not the costs of their appearance.

But where the petition is presented to obtain *confirmation of the contract*, or *payment out*, or *reinvestment* of the money, the company has to pay the costs of appearance of all parties to the suit, including the costs of remainder-men who have obtained leave to attend the proceeding (*Paterson* v. *Paterson*, 10 L. T. N. S. 183), because it is necessary to serve them in such cases, *Haynes* v. *Barton*, 1 Dr. & Sm. 483 ; and see 1 L. R. Eq. 422 ; *Dinning* v. *Henderson*, 2 De G. & Sm. 485, and they may appear by separate counsel, *Re Long*, 12 W. R. 460 ; *Re Brandon*, 2 Dr. & Sm. 162 ; *Bradshaw* v. *Fane*, 1 N. R. 159. These cases seem to have overruled *Hore* v. *Smith*, 14 Jur. 55.

Vexatious appearances.

But there is this exception, that if the parties who might and ought to appear together, vexatiously appear separately, and thereby increase the costs, the company will not have to pay these increased costs, *Ex parte Baroness Braye*, 11 W. R. 333. And see *Re Nicholl's Trusts*, 14 W. R. 475.

Costs of service upon and appearance of incumbrancers.

The following rule is established as to the service of petitions for investment of monies in Court upon mortgagees and incumbrancers and the costs of their appearance (though there has been contradictory decisions on the subject, see particularly *Re Brooks*, 30 Beav. 233, and 12 W. R. 1128 ; *Re Nash*, 25 L. J. Ch. 20 ; *Re Thomas*, 12 W. R. 546 ; *Re Hatfield*, 29 Beav. 370, and 32 Beav. 252).

Mortgagee not opposing. Tender of 40*s.* costs.

If the mortgagee is not in possession and is a consenting party to the petition, such mortgagee should not generally appear, see *Re Bingham*, W. N. (1868) 244 ; *Re Lord Bexley*, W. N. (1872) 188, but 42*s.* costs ought to be tendered to such mortgagee at the time of service of the petition, to enable him to consult a solicitor, see Additional Orders (Costs) Aug. 1875 (p. II., *post*) ; *Re Duggan*, L. R. 8 Eq. 697 ; *Wood* v. *Boucher*, L. R. 6 Ch. 77 ; *In re Halstead United Charities*, L. R. 20 Eq. 48 ; see the judgment of the Lords Justices in *Gore Langton's Estate*, L. R. 10 Ch. 328, following V.-C. Wood's opinion expressed in *Re Hungerford*, 1 Kay & Johnson, 413 (where *Ex parte Smith*, 6 Rly. Ca. 150, was remarked on), s. c. 3 Kay & Johnson, 455.

Mortgage created since payment in.

And if the mortgage was created since the payment into Court the company need not pay any costs of the mortgagees, *Re Jones*, 39 L. J. Rep. N. S. Ch. 190 ; or if the mortgage affects part of an estate but not the part taken, *Re Yeates*, 12 Jur. 279.

And where the petition is for interim investment and payment of dividends only, mortgagees of the inheritance ought not to be served, *Re Morris*, 20 L. R. Eq. 470 ; *Re Dowling*, 45 L. J. Ch. 568.

Costs of appearance of trustees.

It has been held that the company must pay the costs of trustees who have been properly served and appear, *Re Finch*, 14 W. R. 472 ; *Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 48 ; *Henniker* v. *Chafy*, 35 Beav. 124 ; overruling on this point *Wilson* v. *Foster*, 26 Beav. 398 ; and see *Re*

7 & 8 Vict. c. 18, s. 80.

Burnell, 12 W. R. 568; *Re Bowes*, 12 W. R. 929; *Re East*, 2 W. R. 111; *Ex parte Metropolitan Ry.*, 3 W. N. (1868) 204.

But the trustees ought not to appear on a petition for interim investment by a tenant for life, *Re Dowling*, M. R., May 27, 1876. See *Re Finch*, 14 W. R. 472; *Re Bowes*, 12 W. R. 929.

Of other persons whose consent is required.

The costs of appearance of the Ecclesiastical Commissioners (their consent in writing to the reinvestment being sufficient), were not allowed against the company, in *Ex parte Bishop of London*, 2 D. F. J. 14; and see *Re Incumbent of Whitfield*, 1 J. & H. 610; but the costs of appearance of the Ordinary were allowed in *Ex parte Vicar of Creech St. Michael*, 21 L. J. Ch. 677, and of the Att.-Gen. on a petition under Sir S. Romilly's Act, in *Re London and Brighton Railway Company*, 18 Beav. 608; and of freemen of a city where the land taken belonged to a corporation, *Ex parte Mayor of Lincoln*, 6 Rly. Ca. 738.

Costs of appearance of remaindermen.

And generally if a tenant for life petitions for interim investment or for payment out, or for reinvestment in land; and there is no suit pending or other special circumstances, the petition should not be served on remaindermen or trustees, *Ex parte Staples*, 1 D. M. G. 294; *Re Whitling*, 9 W. R. 830; *Re Marner*, L. R. 3 Eq. 432; *Re Dowling*, 45 L. J. Ch. 568.

Service on persons entitled to other shares.

And where a petitioner is only entitled as one of a class to an aliquot part of the fund service on the other parties interested may be dispensed with, *Re Midland Ry.*, 11 Jur. 1095.

When remaindermen should be served.

But where the petition is under section 74 for the application of purchase-money paid in respect of leases or reversions which are in settlement, and the apportionment thereof between tenant for life and remaindermen, the remaindermen are "parties interested" within the section, and are entitled to appear, *Re Brailey*, W.N. (1866) 109; *Re Crane*, 7 L. R. Eq. 322; see *Re Romney*, 3 N. R. 287.

And when the petition is for reinvestment not in land or hereditaments but in improvements, the remaindermen should be served, *Re Leigh*, L. R. 9 Ch. 684.

What costs are not reasonable.

The Court will take care that the company are not put to unnecessary costs; *e.g.*, of unnecessary matter in a petition, *Ex parte Osbaldiston*, 8 Hare, 31; *Haire* v. *Lovitt*, 12 L. T. 307; but the introduction into the petition of clauses in *special Acts* is not necessarily impertinent, *Re Lilley*, 17 Sim. 110.

Lengthy petitions.

Unnecessary and defective petitions.

So, if a second petition is necessary by reason of a defect in the first, the company will not have to pay the costs, see *Re London and Brighton Railway Company*, 18 Beav. 608, 612; *Ex parte Jolliffe*, 3 Jur. N. S. 633; *Re Byrom*, 5 Jur. N. S. 261; *Re Leigh*, 6 L. R. Ch. 887; *secus* where the defect was in the order, *Re Goe*, 3 W. R. 129; *Re Bazett*, 16 L. T. 279; where the costs of two necessary petitions were allowed against the company, but see *Re Oakham School*, 23 L. T. 251, and *Re Pryor*, W. N. (1876) 41.

Where two portions of a settled estate had been taken by different corporations, and the purchase-money had been paid into two different branches of the Court, and two petitions were presented for reinvestment of the two funds together in one purchase, the Court only allowed the costs of one as costs *under* the *Act*, *Re Gore Langton's Estates*, 10 L. R. Ch. 328, but the costs in such a case are a matter of discretion for the judge, *ibid.*, and see *Re Butterfield*, 9 W. R. 805, and other cases cited at foot of note (*f*), *supra*.

Subsequent dealings with the money after transfer.

When the purchase-money has been once paid out, or transferred to a new account (*Melling* v. *Bird*, 17 Jur. 155), the company ought not to pay the costs of any further applications rendered necessary by subsequent dealings with, or settlements of the property by, the landowner, or by the appointment of new trustees of the property, *Re Andenshaw School*, 1 N. R. 255, and see *Ex parte Hordern*, 2 De G. & Sm. 263; *Re Byrom*, 7 W. R. 367; *Ex parte Vicar of Kidderminster*, 7 W. R. 482; see *Ex parte Baroness of Braye*, 11 W. R. 333, and cases at foot of note (*c*) *supra*.

Thus, where an order directed payment of dividends to a tenant for life, the company had not to pay the costs of a subsequent order for payment of them to an assignee of the tenant for life, *Re Byrom*, 5 Jur. N. S. 261.

7 & 8 Vict. c. 18, s. 80.

Where other money is invested besides the sum paid in by the company, the Court will take care that the costs are not thereby increased, *Re Branmer*, 14 Jur. 236 ; *Re Loveband*, 9 W. R. 12 ; *Ex parte Hodge*, 16 Sim. 159 ; *Ex parte Tetley*, 4 Rly. Ca. 55 (but see *Ex parte Lord Palmerston*, *ibid.* 57); *Ex parte King's College*, 5 De G. & Sm. 621 ; *Ex parte Newton*, 4 Y. & Coll. 518 ; *Attorney-Gen.* v. *Mayor of Rochester*, 15 W. R. 765 ; *Ex parte Ecclesiastical Commissioners*, 13 W. R. 575.

Where other money is invested besides that paid in.

(*l*) The costs of payment-out include those of a disentailing deed, *if necessary* (see p. 38 *ante*), *Re Brooking*, 2 Giff. 31 ; *Ex parte Vaudrey*, 3 Giff. 224 ; and of half-yearly sales where necessary for apportionment as between tenant for life and remaindermen of leaseholds (p. 43, *ante*), *Re Long* and *Ex parte Edmunds*, cited note (*i*) *ante*.

Costs of payment out.

As to costs of reinvestment when asked for by a person absolutely entitled, see note at foot of p. 51, *ante*.

(*m*) The words "except such as are occasioned," &c., refer to "costs" and not to "proceedings," *Re Cant*, 1 D. F. J. 153 ; *Ex parte Rector of St. James*, 9 Jur. N. S. 1222. The usual form of order directs the company "to pay the costs of obtaining this order, &c., and of all the proceedings relating thereto, *except such costs (if any) as are occasioned by litigation between adverse claimants*," Seton, p. 1072, and see *Ex parte Hooper*, 1 Drew. 264. The latter words ought not to be omitted, unless it is clear that there are no such costs ; see *Re Cant*, loc. cit., where the Lords Justices directed the words to be inserted "without prejudice to the course which the taxing-master might take when the matter came before him," *Re Courts of Justice Commissioners*, 3 W. N. (1868) 124. In a simple case the order should specify what costs fall within the exception, *Re Tookey*, 16 Jur. 608; *Re Longworth*, 1 K. & J. 1 ; *Ex parte Collins*, 15 L. T. 362 ; *Ex parte Palmer*, 13 Jur. 781.

Exception of costs of litigation.

This exception only applies where there is an actual *litis contestatio* (*Re Longworth*, 1 K. & J. 1 ; *Re Spooner*, *ibid.* 220 ; *Re Hungerford*, *ibid.* 413 ; *Ex parte Hooper*, 1 Drew. 264). Thus, where the land belonged to a devisee for life with remainder to the testator's heirs, it was held that the company must pay the costs of two petitions by two co-heirs, and also the costs of investigating the title of other parties who claimed to be heirs, in answer to advertisements ordered to be issued by the Court, except such costs as were occasioned by affidavits of the petitioners in answer to such claims (*Re Spooner*, 1 K. & J. 220 ; and see *Haire* v. *Lovitt*, 12 L. T. 306).

Adverse claimants.

Where adverse claims to purchase-money necessitated payment into Court and afterwards one of the two claimants abandoned his claim, the company was not liable for the costs occasioned by the adverse claim, *Re English*, 13 W. R. 932 ; see *Re Palmer*, 13 Jur. 781.

It was said by V.-C. Kindersley, in *Re Tookey*, 16 Jur. 708, that the exception was not intended to apply to a question of construction decided by the Court on petition, but to a case where an action at law was necessary to decide the rights of the parties. See, too, *Ex parte Palmer*, 13 Jur. 781, where V.-C. Shadwell laid down that "the exception in the Act was intended to apply to such a case as where an action of ejectment has been brought by one claimant of land against another," and *Re Singleton*, 11 W. R. 871 ; where it was said that the mere fact of difficulties occurring in ascertaining who were the parties entitled to the money in court, did not bring the case within the exception, *Re Woodburn*, 13 L. T. N. S. 237 ; *Re Gregson*, 2 H. & M. 504 ; *Ex parte Gardner*, 3 R. C. 117 ; *Ex parte Yates*, W. N. (1869) 150 ; *Re Wilson*, W. N. (1867) 110.

Where a question arising on the construction of a will relating to the property taken was argued by the petitioner and the respondents, the company was only ordered to pay one set of costs, *Ex parte Styan*, Johns. 387 ; see *Haire* v. *Lovitt*, 12 L. T. 306. In another case, an additional application having been rendered necessary by litigation, no order as to costs was made thereon (*Ex parte Jolliffe*, 3 Jur. N. S. 633 ; see *Re Hatfield*, No. 2, 32 Beav 252). But in *Carpmael* v. *Proffitt*, 23 L. J. Ch. 165, it was held that the fact of a second petition being rendered necessary by the investment of the purchase-monies in other lands sold in a pending suit did not bring the case within the exceptions in the Act. See Seton, 1087.

When a company had by virtue of two different Acts, taken two pieces

7 & 8 Vict. c. 18, s. 80.

of land held under the same title, with knowledge that such title was disputed, and taken a conveyance from both claimants, it had to pay the costs of two petitions for investment, including the costs in each case of the appearance of the adverse respondents, for they appeared on the petition as vendors, not as litigants (*Re Butterfield*, 9 W. R. 805). In *Re Bagot's Settlement*, 10 W. R. 607, V.-C. Kindersley, upon a special Act containing clauses as to costs substantially the same as those in the Lands Clauses Consolidation Act, decided that the company must pay all the costs of a petition to obtain payment of money out of court, involving a question of disputed conversion, except the costs of the petitioner and of a respondent, both of whom had failed in their contentions, see *Re Longworth*, 1 K. & J. 1.

(*n*) See note at head of p. 52, *ante*.

Successive re-investment.

Conveyances.

And with respect to the conveyances of lands, be it enacted as follows:

Form of conveyances.

LXXXI. Conveyances of lands to be purchased under the provisions of this or the special Act, or any Act incorporated therewith, may be according to the forms in the schedules (A) and (B) respectively to this Act annexed, or as near thereto as the circumstances of the case will admit, or by deed in any other form which the promoters of the undertaking may think fit; and all conveyances made according to the forms in the said schedules, or as near thereto as the circumstances of the case will admit, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall operate to merge all terms of years attendant by express declaration or by construction of law on the estate or interest so thereby conveyed, and to bar and to destroy all such estates tail, and all other estates, rights, titles, remainders, reversions, limitations, trusts, and interests whatsoever of and in the lands comprised in such conveyances which shall have been purchased or compensated for by the consideration therein mentioned; but although terms of years be thereby merged they shall in equity afford the same protection as if they had been kept on foot and assigned to a trustee for the promoters of the undertaking, to attend the reversion and inheritance.

Costs of conveyances.

LXXXII. The costs of all such conveyances (*o*) shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred (*p*) on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands

terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title. 7 & 8 Vict. c. 18, s. 82.

(*o*) The costs of a conveyance prepared but not used by reason of incumbrancers refusing to join, were held to be payable by the company in *Re Diver*, 1 Jur. N. S. 995. Costs of conveyance in cases of contract,

(*p*) There is a distinction between the costs payable by the company under this section and under section 80, *supra*, the reason being that the former section refers to cases where the company uses its *compulsory* powers and therefore has to pay *all the costs* arising out of the transaction; but this section relates to purchases *by agreement* where the vendor can make his own terms, or, if he goes before a jury, can urge any incidental expenses before the jury as a ground for increase of compensation; therefore this section deals only with the legal expenses of making a title and conveying the property, taking those expenses in their largest sense (*e.g.*, including the taking out administration for purposes of conveyance, *Re Liverpool Improvement Act*, 5 L. R. Eq. 282; reversing *Re S. Wales Ry.*, 14 Beav. 418), but not with any costs of ascertaining what that is which is to be put into the document, *Ex parte Buck*, 1 H. & M. 519, where the costs of apportioning ground-rent between houses taken and houses not taken were disallowed against the company on taxation; and see *Ex parte Incumbent of Alsager*, 2 W. R. 324; *Ex parte Feoffees of Addie's Charity*, 3 Hare, 22; *Re Woodburn*, 31 L. T. N. S. 237. different from costs under sect. 80. Costs of apportionment; 13/-

As to the costs occasioned by a vendor dying and leaving an infant heir or devisee, so that a suit or petition under the Trustee Act (p. 97, *post*) is necessary, see *Re South Wales Ry.* (reversed), *ubi sup.*; *Armitage* v. *Askham*, 4 Jur. N. S. 227; *Scott* v. *Scott*, 11 W. R. 766; *Ex parte Cave*, 26 L. T. 176 (1856); *Williams* v. *Glenton*, L. R. 1 Ch. 200, and cases cited; *Purser* v. *Darby*, 4 K. J. 41; *Re Lowry*, L. R. 15 Eq. 78. The company had agreed to pay all the costs "of and incidental" to the conveyance, *Lake* v. *Eastern Counties Railway Company*, 19 L. T. 323; and see *Re Rhodes*, 8 Beav. 224; Seton, 1089; *Ex parte Morris*, 12 L. R. Eq. 418. of Petition under Trustee Act.

Where the agreement was to sell in fee simple the company had not to bear the expense of discharging a mortgage, *Ex parte Phillips*, 11 W. R. 54, overruling S. C. 2 J. & H. 390.

LXXXIII. If the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof (*q*), such costs shall be taxed by one of the taxing-masters of the Court of Chancery, or by a Master in Chancery in Ireland, upon an order of the same Court, to be obtained upon petition in a summary way by either of the parties; and the promoters of the undertaking shall pay what the said Master shall certify to be due in respect of such costs to the party entitled thereto, or in default thereof, the same may be recovered in the same way as any other costs payable under an order of the said Court, or the same may be recovered by distress in the manner hereinbefore provided in other cases of costs; and the expense of taxing such costs shall Taxation of costs of conveyances.

7 & Vict. c. 18, s. 83.

be borne by the promoters of the undertaking, unless upon such taxation one-sixth part of the amount of such costs shall be disallowed, in which case the costs of such taxation shall be borne by the party whose costs shall be so taxed, and the amount thereof shall be ascertained by the said master, and deducted by him accordingly in his certificate of such taxation (*r*).

(*q*) See *Re Rhodes*, 8 Beav. 224; *Lake* v. *Eastern Counties Railway Company*, 19 L. T. 323.

(*r*) See *Ex parte the Great Western Railway Company*, 3 Rly. Ca. 516; and *Re Spooner*, 1 K. & J. 220.

[By sect. 84, the Company may enter on the lands before purchase, in order to survey, but not for any other purpose except after deposit of the price under the following sections.]

Promoters to be allowed to enter on lands before purchase, on making deposit by way of security, and giving bond.

LXXXV. Provided also, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made, or verdict given for the purchase-money, or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit (*s*) in the Bank by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two justices * in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond, under the common seal of the promoters, if they be a corporation, or, if they be not a corporation, under the hands and seals of the promoters, or any two of them with two sufficient securities, to be approved of by two justices * in case the parties differ, in a penal sum equal to the sum so to be deposited conditioned for payment to such party, or for deposit in the Bank (*t*) for the benefit of the parties interested in such lands, as the case may require under the provisions herein contained of all such purchase-money or compensation, as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands

* Now the Board of Trade, 30 & 31 Vict. c. 36.

* See marginal note, p. 58, *supra*.

so entered upon, together with interest thereon, at the rate of five pounds per centum per annum, from the time of entering on such lands, until such purchase-money or compensation shall be paid to any such party or deposited in the Bank for the benefit of the parties interested in such lands, under the provisions herein contained (*u*); and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special Act. 7 & 8 Vict. c. 18, s. 85.

(*s*) See Kerr on Injunctions, 308, as to this section. The Company is not to proceed under this section unless there is an urgent need for immediate entry, *Field* v. *Carnarvon Rly. Co.*, 5 L. R. Eq. 190. The payment of this deposit by the railway company does not deprive the landowner of his right to have the value of the land ascertained afterwards, and to have the ordinary lien of a vendor both for such actual value and for the compensation for severance and inconvenience; *Walker* v. *Ware, &c., Railway Company*, 35 Beav. 52, 1 L. R. Eq. 195. Landowner's rights, independently of deposit.

As to what the deposit covers, see note (*y*) to 587, *infra*.

(*t*) See as to payment into Court of additional purchase-money, found to be payable, *Ex parte London, Tilbury, and Southend Railway Company*, 1 W. R. 533; *Ashford* v. *L. C. & D. Ry. Coy.*, W. N. (1866) 288.

(*u*) As to the interest payable where the entry was originally wrongful, but the requirements of the statute have been afterwards satisfied, see *Willey* v. *South Eastern Railway Company*, 1 M. & G. 59. Interest.

LXXXVI. The money so to be deposited as last aforesaid shall be paid into the Bank in the name and with the privity of the Accountant-General of * the Court of Chancery in England, or the Court of Exchequer in Ireland, to be placed to his account there to the credit of the parties interested in or entitled to sell and convey the lands so to be entered upon and who shall not have consented to such entry, subject to the control and disposition of the said Court, and upon such deposit being made, the cashier of the Bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit, the same shall have been paid in. Upon deposit being made cashier to give receipt.

*See now 35 & 36 Vict. c. 44, s. 4.

7 & 8 Vict. c. 18, s. 87.

Deposit to remain as a security, and to be applied under the direction of the Court.

LXXXVII. The money so deposited as last aforesaid, shall remain in the Bank by way of security to the parties whose lands shall so have been entered upon, for the performance of the condition of the bond to be given by the promoters of the undertaking as hereinbefore mentioned, and the same may, on the application by petition of the promoters of the undertaking, be ordered to be invested (*w*) in Bank Annuities or Government securities, and accumulated; and upon the condition of such bond being fully performed it shall be lawful for the Court of Chancery in England, * or the Court of Exchequer in Ireland, upon a like application (*x*), to order the money so deposited in the Funds in which the same shall have been invested together with the accumulation thereof to be repaid (*y*) or transferred to the promoters of the undertaking (*z*) or if such conditions shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such manner as it shall think fit for the benefit of the parties, for whose security the same shall so have been deposited.

* See Judicature Act, 1873, s. 34 (2).

Investment of deposit.

(*w*) On application by the promoters for investment the landowner need not be served, *Ex parte Carmarthen and Cardigan Railway Company*, 2 N. R. 515.

Repayment of deposit—Petition for.

(*x*) For form of order for repayment of deposit, see Seton, 1074.

The petition for repayment of the deposit should be served on the landowner, and he is entitled to his costs of appearing, *Ex parte Stevens*, 2 Ph. 772, Seton, 1090; but Lord Romilly, M.R., disallowed such costs in *Re Tottenham, &c., Railway Company*, 14 W. R. 669.

Deposit *repaid* though vendor's costs are not paid;

(*y*) The deposit is not subject to any lien for any sum beyond what is included in the bond, *e.g.*, for money awarded in respect of minerals, *Ex parte Neath, &c. Railway*, L. R. 2 C. D. 201; for the costs of the vendor, but upon due performance of the condition the company are entitled to have the money paid out, notwithstanding that a question may be pending with respect to such costs, *Ex parte Stevens*, 2 Ph. 772; *Ex parte Great Northern Railway Company*, 16 Sim. 169; 5 Railway Cases, 269, s. c. on appeal, *ibid.* 272; *Ex parte London, Chatham, and Dover Railway Company*, 3 W. N. (1868) 675. Or notwithstanding that the landowner is proceeding at law to set aside the award, *Re Fooks*, 2 M & G. 357. So in *Re Birmingham, Wolverhampton, and Dudley Railway Company*, 3 N. R. 290, where that company had paid money into court in respect of lands on which they desired to enter, but an opposition company had filed a bill to restrain such entry, and the Birmingham Company in consequence gave up their intention to purchase the lands, the opposition company asked that the deposit should not be paid out to the Birmingham Company until they had paid the costs of the suit for an injunction, and contended that as the conditions of the bond given by the company had not been fulfilled, the Court had a discretion as to allowing the money to be paid out; but V.-C. Wood held that the words of the section relating to the non-fulfilment of the bond, did not apply to cases where the only reason why the condition of the bond was not fulfilled was, that neither party desired it, and he allowed the money deposited to be paid out. The

though award is disputed;

though the company has to pay costs of a suit;

though purchase goes off.

deposit is only applicable as security for the landowner actually treated with, and not as security for his mortgagees, though the company ought to have treated with them, *Martin* v. *London, Chatham, and Dover Railway Company*, L. R. 1 Ch. 501. 7 & 8 Vict. c. 18, s. 87.

Where a company, after paying a deposit into Court and entering on lands under these sections, afterwards concluded the purchase by contract, the Court refused to pay the deposit out unless the vendor joined in the petition, or was served with a copy of it, *Ex parte South Wales Railway Company*, 6 Rly. Ca. 151; see *Ex parte Eastern Counties Railway Company*, 5 Rly. Ca. 210. *Not repaid where a contract is afterwards entered into.*

(*z*) It was held on petition by a railway company for repayment of money deposited under these sections to the secretary of the company, that payment might be ordered on the petition being stamped with the company's seal, without the necessity of verifying the seal, *Ex parte London, Chatham, and Dover Railway Company*, 8 W. R. 636. Repayment to secretary.

As to the authority requisite on the part of the company, see Seton, 1091.

PARLIAMENTARY DEPOSIT ACT.

9 VICT. CAP. 20.

An Act to amend an Act of the Second Year of Her Majesty for providing for the Custody of certain Monies paid, in pursuance of the Standing Orders of either House of Parliament, by Subscribers to Works or Undertakings to be effected under the authority of Parliament.

[18*th June*, 1846.

[Sections 1-4 provide for payment of sums of money, required by any Standing Order of Parliament to be deposited by the subscribers to any undertaking, which is to be executed under the authority of an Act of Parliament, into Court, by persons named in the warrant of one of the clerks of the House to the account *ex parte* the work or undertaking mentioned in such warrant or order; and for interim investment in Bank Annuities, or any Government security or securities at the option of the aforesaid person or persons, or the survivor or survivors of them (*e.g.*, in East India Stock, *Re Southwold Railway Company's Bill*, L. R. 1 C. D. 697; see *Re Newport Railway*, 11 Jur. 160.)] 9 Vict. c. 20.

V. And be it enacted, that on the termination of the Session of Parliament in which the petition or bill for the purpose of making or sanctioning any such work or undertaking shall have been introduced into Parliament, or if such petition or bill shall be rejected or finally withdrawn (*a*) by some proceeding in either House of Parliament, or shall not be allowed to proceed, or if the person or persons by whom the said money was paid or security deposited shall have failed to present a petition, or if an Act be Repayment of deposit.

9 Vict. c. 20, s. 5.

passed authorising the making of such work or undertaking, and if in any of the foregoing cases the person or persons named in such warrant or order, or the survivors or survivor of them, or the majority of such persons, apply by petition (*b*) to the Court, the Court* shall by order direct the sum of money paid in pursuance of such warrant or order, or the stocks, funds, or securities in or upon which the same may have been invested, and the interest or dividends thereof, or the exchequer bills, stocks, or funds so deposited or transferred as aforesaid, and the interest and dividends thereof, to be paid or transferred to the party or parties so applying, or to any other person or persons (*c*) whom they may appoint in that behalf; but no such order shall be made in the case of any such petition or bill being rejected or not being allowed to proceed, or being withdrawn or not being presented, or of an Act being passed authorising the making of such work or undertaking, unless upon the production of the certificate of the Chairman of Committees of the House of Lords with reference to any proceeding in the House of Lords, or of the Speaker of the House of Commons (*d*) with reference to any proceeding in the House of Commons, that the said petition or bill was rejected or not allowed to proceed, or was withdrawn during its passage through one of the Houses of Parliament, or was not presented, or that such Act was passed, which certificate the said Chairman or Speaker shall grant on the application in writing of the person or persons, or the majority of the persons named in such warrant, or the survivor or survivors of them: Provided always, that the granting of any such certificate, or any mistake or error therein or in relation thereto, shall not make the Chairman or Speaker signing the same liable in respect of any monies, stocks, funds, and securities which may be paid, deposited, invested, or transferred in pursuance of the provisions of this Act, or the interest or dividends thereof (*e*).

* See Judicature Act, 1873

Granting certificate, &c., not to make the chairman or speaker signing the same liable.

(*a*) Payment out of part of a deposit on withdrawal of part of the undertaking was refused, *Re Aberystwith Ry.*, 3 D. F. J. 301.

(*b*) As to the form of petition and authority, see *Re Dartmouth Ry.*, 9 W. R. 609; *Ex parte London C. and D. Ry. Coy.*, 8 W. R. 636.

(*c*) *E.g.*, to the bankers or solicitors of the company, *Ex parte Warwick, &c., Ry.*, 13 Sim. 31; *Re Dartmouth Ry.*, 9 W. R. 609.

(*d*) The deputy Speaker's certificate was held sufficient in *Ex parte Stockbridge Railway Bill*, 2 L. R. Eq. 364. 9 Vict. c. 20, s. 5.

(*e*) The deposit will be paid out on the abandonment of a railway under 32 & 33 Vict. c. 114. See s. 4 of that Act which applies these sections, and see as to conflict of claims to the Parliamentary deposit of an insolvent company, *Re Bradford Tramways Company*, L. R. 10 Eq. 613, 2 Ch. Div. 373 ; *Re Kensington Station Act*, L. R. 20 Eq. 19. Railway Abandonment Act.

An application for payment out of a Parliamentary deposit is Long Vacation business, 44 L. J. Ch. n. s. 774.

TRUSTEE RELIEF ACT, 1847.

10 & 11 VICT. CAP. 96.

An Act for better securing Trust Funds, and for the Relief of Trustees (*a*). [22*nd July*, 1847.

10 & 11 Vict. c. 96.

WHEREAS it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved: Be it enacted, &c., that all trustees, executors, administrators, or other persons (*b*), having in their hands any monies belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit (*c*), shortly describing the instrument creating the trust, according to the best of their knowledge and belief to pay (*d*) the same, with the privity of the Accountant-General of the High Court of Chancery,* into the Bank of England, to the account of such Accountant General * in the matter of the particular trust (*e*), (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court, and that all trustees or other persons having any annuities or stocks (*f*) standing in their name in the books of the Governor and Company of the Bank of England, or of the East India Company, or South Sea Company, or any Government or Parliamentary securities standing in their names (*g*), or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them (*g*), shall be at liberty (*h*) to transfer or deposit such stock or securities into or in the name of the said Accountant-General, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court (*i*);

Trustees may pay trust monies or transfer stock and securities into Court.

* See Judicature Act, 1873, s. 34 (2).

* Now the Paymaster-General, 35 & 36 Vict. c. 44, s. 4.

10 & 11 Vict. c. 96.

Receipt of Bank cashier, or certificate of proper officer, to be sufficient discharge.

and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge (*k*) to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited.

Proceedings under Trustee Relief Act, how far equivalent to a suit.

(*a*) As to costs under the Act, see note (*i*) *infra*, p. 67.

As to what questions will be decided on petition under the Act, see note (*n*) p. 71, *infra*.

An order under this Act has the same force as a decree, *Re Smyth*, 11 W. R. 850.

Service.

The Court would not order notice of a petition to be served out of the jurisdiction, in *Re Barnard*, 6 Ir. Ch. R. 133 ; decided under the Irish Act, which is similarly worded.

Sanction of charity commissioners to orders relating to charity money.

Payment of money into court, under an Act, is a "suit or matter actually pending," so as to give the Court jurisdiction to make orders as to charity monies paid in, without the sanction of the Charity Commissioners, which by 16 & 17 Vict. c. 137, s. 17, is necessary for all legal proceedings not being applications in a *suit or matter actually pending*, *Re St. Giles' Volunteer Corps*, 25 Beav. 313, and see *Re Cheshunt College*, 1 Jur. N. S. 995 ; *Att.-Gen.* v. *Cooper*, 10 W. R. 31 ; but where an order has been made, *which is in effect final*, the matter is no longer "pending," and the sanction of the commissioners must be obtained for further proceedings (see note at foot of p. 37, *ante*) *Re Jarvis' Charity*, 1 Dr. & Sm. 97 ; and see *Lord Hatherley's* remarks in *Braund* v. *Earl of Devon*, 3 L. R. Ch. 801, 806 ; but see, as to payment of charity monies to official trustees, note (*b*), next page.

Legacy Duties Act.

Where the money which it is desired to pay into court belongs to infants use may be still made of the 36th Geo. 3, cap. 52, which applies whether there is any difficulty in the execution of the trust or not. The 32nd section enacts, that "where by reason of the infancy or absence beyond the seas of any person entitled to any legacy, or to the residue of any personal estate or any part thereof chargeable with duty by virtue of this Act, the person or persons having or taking the burden of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue or some part thereof, although he, she, or they may have the same or some part thereof in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the Paymaster-General (see 35 & 36 Vict. c. 44, and especially the 2nd schedule, part 2 of Acts partly repealed), and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid, and such money, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery by petition or motion in a summary way : Provided always that, if it shall afterwards appear that such money or any part thereof has been improperly paid into the Bank as aforesaid, it shall be lawful for the said Court of Chancery, upon petition in a summary way, to dispose thereof, in such manner as justice shall require."

Cases on Legacy Duties Act.

An order was made upon petition under that Act for transferring a legacy of stock to the account of infant legatees (*Re Watlington's Trusts*, 1 W. R. 194, where it was held that an application for a transfer of Consols purchased with a legacy paid into court under the Act might be made *by motion*), *Ex parte Bennett*, 15 Jur. 213. It was said by Lord Alvanley,

when Master of the Rolls, that since the above statute, he would not give the costs of a suit to have a legacy bequeathed to an infant secured, as the executor has nothing to do but to pay it into Court under the Act (*Whopham* v. *Wingfield*, 4 Ves. 630 ; and see *Handley* v. *Davies*, 28 L. J. Ch. 873, 5 Jur. N. S. 190). Under the Trustee Relief Act, the executor has a year from the testator's death allowed him for paying the money into the Bank (Williams on Executors, ed. vi. p. 1306.). 10 & 11 Vict. c. 96, s. 1.

In *Rimell* v. *Simpson*, 18 L. J. Ch. 55, executors, who, instead of paying the infant's legacy into Court under the 36th Geo. 3, c. 52, kept the money in their hands, were decreed to pay the legacy with interest at £4 per cent., and to pay the costs of a suit to replace it. For the mode of investment under the Act, see rule 65 of Rules under Chancery Funds Act, 1872 (pt. II. *post*).

(*b*) The following persons have been held to be entitled to pay monies into court under this Act—Mortgagees who have sold under a power of sale and are in doubt as to who is entitled to the balance of the money, *Roberts* v. *Ball*, 24 L. J. Ch. 471, 3 W. R. 466 ; Insurance Companies where there are *bonâ fide* counter claims (see *Desborough* v. *Harris*, 5 D. M. G. 439) to the monies insured, *Re Hall's Policy*, 10 W. R. 37 ; *Re United Kingdom Assurance Company*, 34 Beav. 493 ; *Re Webb's Policy*, 2 L. R. Eq. 456 ; *Re Mosely*, 18 W. R. 126 ; but the right to pay money, *not being trust money*, into Court, under the Act, was doubted by Jessel, M. R., in *Re Haycock's Policy*, L. R. 1 C. D. 611 (but see now s. 25 (6) of the Judicature Act, 1873, under which a debtor may pay a debt into Court, in case of a disputed claim) ; purchasers who could not otherwise get receipts, *Cox* v. *Cox*, 1 K. & J. 251 ; mere stakeholders, see *Re Kemptner*, 8 L. R. Eq. 286. Who may pay money into Court under Trustee Relief Act.

As to some out of several trustees paying in, see note (*g*) page 67.

As to when trustees are justified in paying money into court under the Act, see note (*i*) *infra*, on "*Costs of Trustees.*" In what cases.

Executors may pay in money which they claim beneficially, *Re Henshaw*, 43 L. J. Ch. 98.

Money belonging to a *charity* in the hands of trustees or other persons, may now be paid by them to the official Trustees of Charitable Trusts, 18 & 19 Vict. c. 124, ss. 22, 23 ; compare note (*a*), last page, as to the sanction of the Charity Commissioners to proceedings under the Act. Charity monies.

The owner of an estate charged with a sum in favour of another, is not a trustee of that sum within the Act, otherwise the incumbrancer would have to pay costs in getting the money out, *Re Buckley*, 17 Beav. 110 ; Lewin, 741, note (*a*) ; but where the incumbrancer is an infant, or of unsound mind, such money may be paid in under the 48th sect. of the Trustee Act, 1850, p. 107, *post*. Mortgagor *not* entitled to pay in under Act.

The County Courts have now jurisdiction where the sum does not exceed 500*l*. (28 & 29 Vict. c. 99, s. 1 (5)).

(*c*) The form of affidavit to be used on payment of money into Court under this Act, is provided by the 34th of the Rules under the Chancery Funds Act, 1872 (*post*, pt. II.), and rr. 5—10 of the amended rules under the same Act (*post*, pt. II.), which provide as follows : Affidavit on payment in.

Chancery Funds Rules.

Rule 34. "A trustee or other person desiring to pay money into, or "transfer securities into or to deposit securities in Court under the Act "11 Vict. c. 96, shall file an affidavit entitled in the matter of the same Act "and in the matter of the trust, and setting forth— Chancery Funds Rules r. 35.

(1.) "His own name and address.

(2.) "The place where he is to be served with any petition, summons, or "order, or with notice of any proceeding relating to such money "or securities. Form of affidavit.

(3.) "The amount of money and description and amount of securities "which he proposes to pay or transfer into, or deposit in, Court, and "the credit to which he wishes it to be placed ; and if such money "or securities are chargeable with legacy or succession duty, a

10 & 11 Vict. c. 96, s. 1.

"statement whether such duty or any part thereof has or has not "been paid.

(4.) "A short description of the trust, and of the instrument creating it.

(5.) "The names of the persons interested in or entitled to the money "or securities, and their places of residence, to the best of his know- "ledge and belief.

(6.) "His submission to answer all such inquiries relating to the appli- "cation of the money or securities paid or transferred into, or "deposited in, Court under the same Act, as the Court or Judge "may make or direct.

(7.) "A statement whether the money so to be paid into Court, or the "dividends on the securities so to be transferred into, or deposited "in, Court, and all accumulations of dividends thereon, are desired "to be invested in consolidated 3*l.* per centum annuities, or reduced "3*l.* per cent. annuities, or new 3*l.* per cent. annuities, or whether it "is deemed unnecessary so to invest the same or to place the same "on deposit.*

* See Chancery Funds Rules, r. 66.

"The Chancery Paymaster, on production of an office copy of any such "affidavit, shall give the necessary directions for such payment, transfer, "or deposit to the account of the particular trust mentioned in the affidavit.

"The regulations contained in the General Order of the Court of the "16th day of May, 1862, for the printing of affidavits to be used on the "hearing of a cause, shall be applicable to affidavits filed under this Rule, "and the Chancery Paymaster shall not act upon an office copy of any "such affidavit, filed after the commencement of these Rules, which is not so "printed."

CHANCERY FUNDS AMENDED ORDERS, 5—10.

Chancery Funds Amended Orders, r. 5—10.

5. "A person having made a payment or transfer of money or securities "into, or a deposit of securities in Court under the above-mentioned Act of "10 & 11 Vict. c. 96, shall forthwith give notice thereof to the several per- "sons named in his affidavit to be made in pursuance of Rule 34 of the "Chancery Funds Consolidated Rules, 1874, and the said Act, as interested "in or entitled to such money or securities. (Consolidated Order, Rule 4).

Notice of payment.

6. "The persons interested in or entitled to any money or securities so paid "or transferred into, or deposited in Court, in pursuance of the said Act of "10 & 11 Vict. c. 96, and named in the affidavit, or any of such persons, or "the person so paying or transferring into or depositing in Court, may apply "by petition, or in cases where the fund does not exceed 300*l.* cash or 300*l.* "in securities, by summons, as occasion may require, respecting the invest- "ment, payment out, or distribution of the money or securities, or of the "dividends or interest of such securities (see note (*p*) to s. 2).

Application for payment out.

On notice to trustees, &c.

7. "A person who has paid or transferred money or securities into, or de- "posited securities in Court pursuant to the said Act of the 10 & 11 Vict. "c. 96, shall be served with notice of any application made to the Court, or "judge in chambers, respecting such money or securities, or the dividends "thereof, by any person interested therein or entitled thereto.

And to persons interested.

8. "The persons interested in or entitled to such money or securities shall "be served with notice of any application made by the trustee to the Court, "or Judge, respecting such money or securities, or the dividends thereof.

Place of service.

9. "No petition relating to such money or securities as mentioned in the "last four preceding Orders shall be set down to be heard, and no summons "relating thereto shall be sealed until the petitioner or applicant has first "named in his petition or summons a place where he may be served with "any petition or summons, or notice of any proceeding or order relating to "such money or securities, or the dividends thereof.

Title of petition.

10. "Petitions presented and summonses issued under the said Act of 10 "& 11 Vict. c. 96, shall be entitled in the matter of the said Act, and in the "matter of the particular trust.

Payment of duty.

11. "Every petition for dealing with money or securities in Court, charge- "able with duty payable to the revenue under the Acts relating to legacy or

succession duty, or the dividends on such securities, shall contain a statement whether such duty or any part thereof has or has not been paid." 10 & 11 Vict. c. 96, s. 1.

The notice of payment in, which should be given to the parties interested, has been dispensed with, *Re Hansford*, 7 W. R. 199, 254; where the *cestui que trust* had not been heard of for a long term, see *Re Goodman*, W. N. (1870) 152; when publication in the foreign newspapers was allowed, *Re Palmer*, W. N. (1873) 101. Notice dispensed with.

The affidavit of one of two trustees was held sufficient, *Anon*, 1 Jur. N. S. 974. Affidavit of one trustee.

(*d*) No order is necessary for the payment *into* Court (*Re Bigg*, 11 Beav. 27, but see p. 68, *infra*, as to costs of improper payment in. Payment in.

(*e*) The fund should be lodged to the credit of a particular trust (*Re Joseph's Will*, 11 Beav. 625; *Re Everett*, 12 Beav. 485; and see under the Irish Act, *Re Godfrey's Trust*, 2 Ir. Ch. Rep. 105), and the title of the trust should be as limited in designation as possible, *Re Coulson*, 4 Jur. N. S. 6. Comp. *Re Tillstone's Trusts*, 9 Hare, App. lix., where it was held that a fund bequeathed in aliquot parts on distinct trusts ought to be carried to separate accounts. Where a fund had been paid in to the general account of a testator's will, the Court at first declined to pay the same out to the residuary legatees; but upon consideration of the will it was ordered that the fund should be carried over to an account entitled "the account residue," subject to the particular legacies (*Re Robinson's Trusts*, 1 Jur. N. S. 750). Where a fund is paid into Court "upon the trusts of a will," it has been held that the general administration of the testator's estate becomes necessary, and the Court will not order it to be transferred to a particular account, except on administration of assets by the personal representative, or on the responsibility of the trustee (*Re Wright's Trusts*, 15 Beav. 367; cf. *Re Edwards*, 4 W. R. 801). To what account fund should be paid in. Where fund is paid in "upon the trusts of a will."

But in a later case (*Re Coulson's Trusts*, 4 Jur. N. S. 6), V.-C. Wood ordered a fund paid in to the general account of a testator's will to be carried over to the separate account of the person (an infant) named in the trustee's affidavit, as the only person entitled, without previously directing the name of the account to be changed. Transfer to separate account.

Where trustees paid a fund into Court to the account of one of the claimants, without giving, at the same time, notice to the Court of the adverse claims, payment of the fund to the person in whose name it stood was ordered by the Court, but without prejudice to any future question as between the trustees and the adverse claimants, *Re Jenkins*, 3 N. R. 408; see *Crowe* v. *Cooper*, 1 J. & H. 207, 214, and *Re Jephson*, 1 L. T. N. S. 5; but see *Ex parte Tournay*, 3 De G. & Sm. 677, where money paid in by an executor in ignorance of debts was paid out to him by consent. Where some claimants are not named.

(*f*) Foreign bonds seem not to be within the Act, *Re Lloyd*, 2 W. R. 371; see *Burnie* v. *Getting*, 2 Coll. 324; *Knott* v. *Cottee*, 16 Beav. 77; and as to shares in insurance and other companies, see *Hankey* v. *Morley*, 4 Jur. N. S. 234. What securities may be paid in.

(*g*) The survivors of several trustees may pay into Court, under the Act, *Re Parry*, 6 Hare, 306; and as to payment in by a majority of the trustees, 12 & 13 Vict. c. 74, *post*, p. 74. Majority of trustees.

(*h*) A trustee who prefers to act personally in the trust cannot be compelled to pay the trust fund into Court, *Mountain* v. *Young*, 18 Jur. 770; *Handley* v. *Davies*, 28 L. J. Ch. 873, 5 Jur. N. S. 190, see note to sect. 32 of the Trustee Act, 1850 (p. 29, *post*). But where a trustee being requested to pay money into Court, refused, and thereby made a suit necessary, he had to pay the costs of it, *Handley* v. *Davies*, *loc. cit.*; and see *Gunnell* v. *Whitear*, 10 L. R. Eq. 664. An order may now be made for payment in, where the majority of the trustees are willing, though the rest do not concur, by 12 & 13 Vict. c. 74 (*post*, p. 74). Trustee not compelled to pay in.

(*i*) Though the Act makes no mention of costs, it has been held that, as the fund paid in by the trustee is to be paid in *in trust to attend the orders of the Court*, it therefore becomes subject to the general jurisdiction of the Court, which includes a power to order the payment of costs (*Re Woodburn*, 1 De G. & J. 351; *Re Armston*, 4 De G. J. & S. 454, 1 Jur. N. S. 715. Costs under the Act.

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Costs of unsuccessful claimant.

Thus, though an unsuccessful claimant *may* be allowed his costs out of the fund (*Re Birch's Legacy*, 2 K. & J. 369; *Re Dickson*, 1 Sim. N. S. 47), it is now settled that the Court has power to order the costs of payment out to be borne by a respondent whose unfounded claim was the cause of the payment in, *Re Armston's Trusts*, *loc. cit.* Compare *Newton* v. *Ricketts*, 9 H. L. Cases, 373, affirming *Re Ricketts*, 1 J. & H. 70, where a *feme covert* appeared on a petition for distribution of a fund in Court under this Act, and together with her husband opposed the distribution, and the Court ordered a part of the fund to which she was entitled to her separate use, to be applied to payment of the costs of such opposition; and see *Re United Kingdom Life Assurance Company*, 34 Beav. 493, and *Re Parry*, 12 Jur. 615.

Costs of trustees.

A trustee paying money into Court is *primâ facie* entitled to his costs of such payment in, and of his appearance, when he is served, to the petition for payment out, but the Court will exercise a discretion as to such costs if he pays the money in vexatiously.

Payment into Court is justified where there are lunatic or infant *cestui que trusts*.

An executor or administrator, or trustee, may pay money into Court where he cannot get a valid discharge otherwise; for example, in cases of infant *cestui que trusts*, see *Re Cawthorne*, 12 Beav. 56; *Re Beauclerk*, 11 W. R. 203; *Re Coulson*, 4 Jur. N. S. 6; *Re Richards*, 8 L. R. Eq. 119, or lunatic legacies; *Re Upfull*, 3 M. & G. 281; *Re Irby*, 17 Beav. 334, but in other cases he must have a *bonâ fide* doubt: —

Where there is a doubt who are interested.

As to the parties entitled, *Re Jones*, 3 Drew. 679; *Re Headington*, 6 W. R. 7, where a claim to a trust fund being made by the assignees, under a creditor's deed and also by the assignor, it was held that the trustee was not bound to assume the deed valid, and might pay into Court; compare *Re Moseley's Policy*, 18 W. R. 126. Jessell, M.R., held that the trustees of a trust fund to which their *cestui que trust* has become entitled in default of appointment by a tenant for life, are justified in paying it over to him on being informed in writing by the solicitor to the parties that he has reason to believe that no appointment has been made; and would be free from liability in doing so, and that trustees who, under such circumstances, pay the trust fund into Court under the *Trustees Relief Act* will not, as a rule, be entitled to their costs; *Re Cull*, L. R. 20 Eq. 561. But payment into Court has been held to be justified where a person claimed by representation, for there is a possibility of a disposition by the deceased person, *Re Lane*, 24 L. T. 181; *King* v. *King*, 1 De G. & J. 663; or where a married woman might claim her equity to a settlement, *Re Swan*, 2 H. & M. 34; but see *Re Roberts*, 17 W. R. 639; *Re Brocklesby*, 29 Beav. 652; and see *Re Bendyshe*, 5 W. R. 816; *Re Wylly*, 28 Beav. 458; *Re Williams*, 4 K. & J. 87.

Where there is a doubt on a question of law.

For cases where payment in has been justified on account of a *bonâ fide* doubt as to some question of law arising on the claim, see and consider *King* v. *King*, 1 De G. & J. 663; *Re Metcalfe*, 2 D. J. S. 122, where the *cestui qui trust*, was a professed nun; *Gunnell* v. *Whitear*, 18 W. R. 883, and observations of Sir George Jessell, M.R., in *Re Maclean's Trusts*, 19 L. R. Eq. 282, where it was held that a trustee who paid money into Court under the Act, in consequence of a claim supported by learned counsel, and brought forward *bonâ fide* by a responsible solicitor, and a threat that costs would be asked against him personally if he did not do so, was justified in the course which he took.

When payment into Court is not justified.

Trustees have been disallowed their costs of appearing on a petition for payment out where they acted with unreasonable caution and suspicion, *Re Leake*, 32 Beav. 135; *Re Heming*, 3 K. & J. 40, 2 De G. J. S. 122; *Re Covington*, 25 L. J. Ch. 238, 1 Jur. N. S. 57; *Re Thakeham Monies*, W. N. (1871) 172; *Re Elliott*, 15 L. R. Eq. 194; *Desborough* v. *Harris*, 5 D. M. G. 439; *Firmin* v. *Pullen*, 2 De G. & Sm. 99; *Re Warwick Pearson*, 20 L. T. N. S. 8; or have paid the money in in order to anticipate a bill about to be filed against them, *Re Waring*, 21 L. J. Ch. 784; *Att.-Gen.* v. *Alford*, 4 D. M. G. 843; or have caused unnecessary expense, *Re Metcalfe*, 3 N. R. 657; *e.g.*, by requiring copies of affidavits, *Re Lazarus*, 3 K. & J. 555.

Gross miscon-

In cases of gross misconduct the trustee may even have to *pay the costs* of

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the petition for payment out, *Re Woodburn* (before the full Court of Appeal), 1 De G. & J. 333; *Re Cater*, 25 Beav. 361; *e.g.*, where the Court considers the title of the claimant to have been perfectly clear, *Re Foligno*, 32 Beav. 131; and where the trustee neglected to make inquiries whether the parties interested were alive or dead, *Re Knight*, 27 Beav. 45; *Re Woodburn*, *ubi supra*; *Beaty* v. *Curson*, L. R. 7 Eq. 194, 20 L. T. N. S. 61; but if before paying the money into Court the trustee deducts his costs of payment in, the Court has no jurisdiction, except on bill filed, see *Re Wright*, cited in note (*e*), *infra*, to make any order as to such costs, *Re Bloye*, 1 M. & G. 504; *Re Barber*, 9 Jur. N. S. 1098; such costs, however, have been held to be liable to taxation, *Re Hue*, 27 Beav. 337; *Re Leake*, 32 Beav. 135.

duct of trustees paying in a clear case,

A trustee filing a bill when he might have attained his object under the Act, will have to pay the additional costs thereby incurred, *Wells* v. *Malbon*, 31 Beav. 48 (but see *Smallwood* v. *Rutter*, 9 Hare, 24); *secus*, where he has a right to claim to be discharged from the trusts, for payment in under the Act does not operate as a full discharge, *Barker* v. *Peile*, 2 Dr. & Sm. 340.

or filing bill unnecessarily.

As to costs where the trustees pay money into Court to the wrong account, or without serving all parties who may be interested, see note (*f*), p. 67.

The costs of paying the money *into* Court, as a general rule, ought to be paid out of the estate of the testator whose will caused the difficulty, *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679. But if there be no general residue, or if the difficulty relates to the fund only, or if the fund paid in has been completely severed and appropriated, they may come out of the fund itself, *Re Lorimer*, 12 Beav. 521.

Out of what fund costs are paid—

(1) Of paying *in* and administration;

In *Mutlow* v. *Mutlow*, 4 De G. & J. 539, a fund paid into Court under the Trustee Relief Act, was ordered to bear a proportionate share of the costs of a suit which had been instituted to administer the estate of which it formed part.

The costs of payment out generally come out of the fund itself, *Re Dickson*, 1 Sim. N. S. 37, 47; *Re Ross*, *ibid.*, 196, 200; *Re Jones*, 3 Drew. 679. But as leave may be given to file a bill (see p. 71), which would have the effect of throwing such costs upon the general estate, *Re Sharpe*, 15 Sim. 470, 472; *Re Feltham*, 1 K. & J. 528, 534. So the Court has jurisdiction on a petition to order the costs of payment out to be paid out of the residue, *Re Trick*, 5 L. R. Ch. 170, overruling *Re Bartholomew*, 13 Jur. 380; *Re Hodgson*, 18 Jur. 786.

(2) of paying *out* the *corpus*;

Where a sum of stock representing sixteen shares in a legacy, five of which were held to have lapsed, was transferred into Court, Lord Cranworth, V.-C., held that the lapsed shares ought to bear the costs of the petitioners and respondents, *Re Ham's Trust*, 2 Sim. N. S. 106.

The judges have settled, after consulting together, that henceforth, the costs of a petition by a tenant for life for payment of the income to himself shall be payable out of income, *Re Marner*, 3 L. R. Eq. 432, where V.-C. Kindersley give the reason why such costs are not to be paid out of corpus, namely, the expense and inconvenience of making it always necessary for the remaindermen to appear; see *Re Evans*, 7 L. R. Ch. 609; *Re Whitling*, 9 W. R. 830; and for the cases before the decision in *Re Marner*, *ubi supra*, see *Re Turnley*, 1 L. R. Ch. 152. Where the money was paid into Court in a suit and not under the Act, Malins, V.-C., declined to follow *Re Marner*, *ubi sup.*: (*Scrivener* v. *Smith*, 8 L. R. Eq. 310). The costs, however, of trustees appearing on such an application have been directed to be paid out of corpus, *Re Gordon*, 6 L. R. Eq. 335; *Re Wood*, 11 L. R. Eq. 155; *Re Knight*, 37 L. J. Ch. 409; *Re Mason*, 2 L. R. Eq. 111; but see *Re Whitton*, 8 L. R. Eq. 352; *Re Smith*, 9 L. R. Eq. 374. And where an annuity was given free of duty the costs of a petition for payment thereof was given out of the surplus of the fund, *Re Apthorpe*, 4 W. N. (1869) 84.

(3) of paying *out* income;

As to the amount of costs allowed on a petition for payment out, see *Gover* v. *Stilwell*, 21 Beav. 182; the costs of a second petition unnecessarily presented will be disallowed, *Re Chaplin's Trusts*, 3 N. R. 289.

As to the costs of unnecessary services, see note (*g*), p. 73, *post*.

of serving respondents.

(*k*) These words do not of course mean that a trustee can, by paying trust monies into Court, discharge himself from *liability* for past breaches

Trustee dis-

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of trust in respect of those monies, *Att.-Gen.* v. *Alford*, 2 Sm. & Giff. 488, 4 D. M. G. 843; *Re Fagg*, 19 L. J. Ch. 175; *Re Waring*, 21 L. J. Ch. 783. Nor from liability to pay in more if more is due, *Goode* v. *West*, 9 Hare, 378; *Mitchell* v. *Cobb*, 17 L. T. 25; *Re Jephson*, 1 L. T. N. S. 5; but the payment into Court is so far a discharge as to the monies paid in, that the remedy of the *cestuis que trusts* in respect of any breach of trust as to such monies, or if they wish to deduct the costs retained by the trustee on payment in, is *by action only;* see *Re Wright*, 3 K. & J. 419, 422; *Re Jenkins*, 10 Jur. N. S. 332.

charged *not* from liability (except as to monies paid in),

but from control and active duties, &c.

The trustee, by payment into Court, discharges himself from the future administration of, and control over, the trust fund paid in, *Re Coe*, 4 K. & J. 199; *Re Wright*, 3 K. & J. 421; *Re Tegg*, 1 W. N. (1866) 317; and the Court undertakes such administration in his place (see note (*n*), *infra*), so that when a trustee had paid money into Court a new trustee was allowed to be appointed in his place, he being considered as desirous of being discharged, *Re Williams*, 4 K. & J. 87; *Re Bailey*, 3 W. R. 31.

He is still liable to receive notices, &c.

But he is still trustee of the fund, at any rate until the Court deals with the fund, for the purpose of receiving notices as to incumbrances, &c., *Thompson* v. *Tomkins*, 2 Dr. & Sm. 8; and he cannot get a full discharge except by proceeding to have his accounts taken, *Barker* v. *Peile*, *ibid.* 341; and see note (*g*), p. 73, as to appearances of trustees.

Court of Chancery to make orders on petition, without bill, for application of trust monies and administration of trusts.

II. And be it enacted, that such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust monies, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment (*m*) and payment of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts (*n*) generally, upon a petition (*o*) to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties (*p*) as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct (*q*); and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted (*r*).

Investment of monies paid in.

(*m*) As to investment of funds under the control of the Court, see 23 & 24 Vict. c. ~~88~~, s. 10, *post*, and note thereto.

(*n*) The Court undertakes the control over, and administration of the fund paid in, in place of the trustee, see note (*k*), last page.

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Where monies belonging to a person of unsound mind, but not found so by inquisition, are in Court under the Act, the Court may entertain applications for payment out of such monies for his support in its ordinary jurisdiction, *Re Macfarlane*, 2 J. & H. 675 ; see *Light* v. *Light*, 25 Beav. 252 ; *Re Dodsworth*, 10 Hare, 16 ; and *Re Law*, 30 L. J. Ch. 512 ; *Re Berry*, 13 Beav. 455, and even where the property belonged to a lunatic, the Court has paid it out (under the authority of special enabling statutes, see Seton, p. 1129) to the Poor Law Guardians, *Re Upfull*, 3 M. & G. 281 ; *Re Parker*, 2 W. R. 139) *Re Ward*, *ibid.* 406 ; *Re Drewery*, *ibid.* 436 ; *Re Buckley*, Johnson, 700 ; and see *Re Sturge*, 5 Jur. N. S. 423 ; *Re Burke*, 6 Jur. N. S. 717 ; *Re Dodsworth*, 10 Hare, 16.

Jurisdiction over funds of lunatics and persons of unsound mind.

Jurisdiction to decide questions as in a suit—

The Court has the same jurisdiction upon a petition as in an action, and where cross petitions are presented by the adverse claimants, or where, by consent, the case is treated as if such cross petitions had been presented, the Court had full power to declare the validity or invalidity of any deed on which the claim is rested, *Re Bloye*, 1 M. & G. 488, s. c.; *Lewis* v. *Hillman*, 3 H. L. 607.

Thus, it has been held that, when money is paid in under its provisions, the Court has jurisdiction to decide all questions arising concerning it, just as well as in a suit, and may, if it thinks fit, direct an issue to try the sanity of a testator, or for any other similar purpose (*Re Allen*, Kay, App. 51) ; and make a binding declaration of right under 15 & 16 Vict. c. 86, s. 50, *post* (*Re Walker*, 16 Jur. 1154 ; but see *Sharshaw* v. *Gibbs*, Kay, 333), and may, of course, decide as to the construction of a settlement (*Re Dalton*, 1 D. M. G. 265), or give effect to a married woman's equity to a settlement, by ordering such settlement out of the fund in Court, either on her petition (*Re Disney*, 2 Jur. N. S. 206), or on that of another person (*Re Cutler*, 14 Beav. 220 ; *Re Kincaid*, 1 Drew. 326 ; *Re Grove*, 3 Giff. 575), and may even order payment to a person not petitioning (*Re Woollard*, 18 Jur. 1012); and the mere fact that pedigrees, deaths, &c., have to be proved, which in an action might be admitted, will be no ground for directing an action to be instituted (*Re Harris*, 2 W. R. 442, following *Goode* v. *West*, 9 Hare, 378) ; and see *Ex parte Barnard*, 6 Ir. Ch. Rep. 133 (decided on the Irish Act, 11 & 12 Vict. c. 68), where it was doubted whether the Court had jurisdiction on a petition under the Act to decide a question of election (as to this point, see *Stroud* v. *Norman*, Kay, 313, 326), and where there are creditors or unascertained claims as may be necessary (*Re Allen*, Kay, App. 51): but compare *Hankey* v. *Morley*, 4 Jur. N. S. 234, and *Re Trower*, 1 L. T. N. S. 54, where money paid in was ordered to be distributed as in an administration suit, proper inquiries being directed. As to a general administration being made necessary by generality in the title of the affidavit, see note (*e*) *supra*. It was held that a deed could not be reformed on petition under the Act, *Re Malet*, 10 W. R. 332, overruling *Re Morse*, 21 Beav. 174 ; see *Re Way*, 10 Jur. N. S. 1166 ; but in *Re Hoare*, 4 Giff. 254 (see *Lewis* v. *Hillman*, 3 H. L. Ca. 607), the Court was held to have such jurisdiction and in *Re De La Touche*, L. R. 10 Eq. 603, an order for payment out was made, prefaced by a declaration amounting to rectification of a patent error in a settlement. It was held that a breach of trust could not be remedied, *Re Lloyd*, 2 W. R. 271, and that if a question of adverse title had to be decided, a suit should be directed, *Re Fozard*, 24 L. J. Ch. 441 ; and leave was given to the *cestuis que trusts* to file a bill to have their rights declared, *Thorp* v. *Thorp*, 1 K. & J. 438, and see *Re Sharpe*, 15 Sim. 470.

of married woman's equity to settlement,

of pedigrees, &c.,

of election,

of general administration.

But *not* to reform a deed,

nor remedy a breach of trust.

Leave given to file bill.

Where a fund is paid in under the Act, an assignee should obtain a stop order, *Re Millar*, 6 W. R. 238, see *Re Blunt*, 10 W. R. 379.

Stop order granted without prejudice to conflicting claims.

Though the jurisdiction of the Court is properly confined to the trust money already paid in, yet a trustee who had paid a portion of trust money into Court under the Act, was ordered, on the petition of the *cestui que trust*, whose title was clear, to pay to him the *future* instalments of the fund as they were received (*Re Wright*, 1 Sm. & G. App. v.). And, in a later case, Lord Romilly, M. R., made a prospective order for payment by the Accountant-General to a tenant for life of the income of any future fund

Prospective order for

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paid to the same account (*Re Chamberlain*, 22 Beav. 286, and see note to the case; and *Re Thornton*, 9 W. R. 475). So an order may be made for payment of dividends to successive tenants for life (*Re How*, 15 Jur. 266); and in *Re Brent*, 8 W. R. 270, an order was made under the Act for payment of the dividends of a fund in Court to one tenant for life, and on proof of his death to a second tenant for life, without further order.

payment of future instalments and income.

Application by petition or summons.

(*o*) The application must be by *petition* (*Re Masseliu*, 15 Jur. 1073; *Ex parte Stock*, 5 Ir. Ch. Rep. 341); except where the trust fund does not exceed 300*l.*, in which case, it must be by summons in chambers (rule 6 of Chancery Funds Amended Orders, p. 66, *ante*). And it seems that where the fund is over 300*l.*, a petition is necessary, even though a cause be pending in which a decree has been made (*Otte* v. *Castle*, 1 W. R. 64). When, however, an order has been made on petition, further proceedings upon it may be taken by summons in chambers, *Re Hodges*, 4 D. M. G. 491. And when before the institution of an administration suit the trustees had paid in part of the money under the Act, a petition for payment out was dispensed with, the order for payment out being entitled in the matter of the act, *Dixon* v. *Morley*, 4 W. N. (1869) 49.

Cross petitions where there are counterclaims.

Where the claim is disputed, cross petitions should be presented (*Lewis* v. *Hillman*, 3 H. L. Ca. 607); but, by consent, the case may be treated as if a cross petition had been presented (*ibid.*) And in one case the Court, to save expense, made an order for payment of the fund to the respondents, although they had not presented a petition (*Re Woollard's Trusts*, 18 Jur. 1012).

Form of petition.

The prayer of the petition and notice thereof should specify the exact order sought for, and the precise portions of the fund which are to be transferred to the several parties entitled to it (*Ex parte Barnard*, 6 Ir. Ch. Rep. 133, under the Irish Act, 11 & 12 Vict. c. 68, the provisions of which are similar to those of this Act). Where one of several persons interested applies, the petition should ask that the shares of the other persons should be carried to separate accounts, *Re Hawkes*, 18 Jur. 33; see *Handley* v. *Metcalfe*, 9 Beav. 495; *Re Tillstone*, 9 Hare, App. lix. The petition should set out the effect of the affidavit upon which the money is paid in (*Re Levett*, 5 De G. & Sm. 619; *Re Flack*, 10 Hare, App. xxx.), but it need not, except in special cases, set out the whole affidavit (*Re Courtois's Will*, 10 Hare, App. lxv.). For a form of petition under the Act, see Daniell, iii. 1757.

Who may petition.

As to who may apply, see rule 6 of Chancery Funds Amended Orders, p. 66, *ante*. The trustees are not the proper persons to present the petition, though the Court (see *Re Trower*, 1 L. T. N. S. 54) will make the order on their petition, *Re Hutchinson*, 1 Drew. & Sm. 27, where V.-C. Kindersley, following the decision in *Re Cazneau*, 2 K. & J. 249, allowed the trustees only respondent's costs, and gave the carriage of the order to the *cestuis que trusts*; and the request of one of the *cestuis que trusts* that they should present the petition is not sufficient to justify them in doing so.

Only persons named in the affidavit.

A person not mentioned in the trustee's affidavit cannot, it seems, apply, but must bring an action (*Re Jephson*, 1 L. T. N. S. 5; see *Crause* v. *Cooper*, 1 J. & H. 207, and cases at foot of note (*f*), *ante*).

Infant and curator.

On the application of an infant domiciled in Scotland (who was above the age of puberty), and her curator properly appointed, a fund which had been brought into Court under this Act was ordered to be transferred into the joint names of the infant and her curator (*Re Crichton*, 24 L. T. 267).

An order was made for payment out to parochial authorities for the part maintenance of a pauper lunatic in *Re Phelps*, 28 L. T. N. S. 350.

Evidence and inquiries.

The petition must be supported by proper evidence of the title of the applicant, and, if necessary, inquiries will be directed (*Re Wood*, 15 Sim. 469; *Re Sharpe*, *ibid.* 470; *Re Barber*, 1 Sm. & G. 118; *Re Morgan*, 2 W. R. 439). And a person making an affidavit may be cross-examined (*Re Bendyshe*, 5 W. R. 816). As to trustees taking copies of the affidavits, see *Re Lazarus*, 3 K. & J. 555.

(*p*) A petitioner may apply in formâ pauperis, *Re Money*, 13 Beav. 109; see *Re Lancaster*, 18 Jur. 229.

Service and costs of appearance—

(*q*) The following rule as to service is laid down by rules 7 and 8 of the Chancery Funds Amended Orders, p. 66, *ante*:—(1), the trustees are to be

served with notice of applications by persons interested in the fund; (2), the persons interested are to be served with notice of applications by the trustees. 10 & 11 Vict. c. 96, s. 2.

(1) Trustees, &c.; paying money into Court, have their costs of appearing as respondents to a petition for a stop order, *Re Blunt*, 10 W. R. 379, or (except in cases of vexatious conduct) to a petition for payment out, note (*k*), *ante;* but where the title of a tenant for life petitioning for income is clear, the trustees ought not to appear, *Re Evans*, 7 L. R. Ch. 619; *Re Battell*, 21 W. R. 138. of trustees;

A petition for payment to a lunatic's executors of money paid in by the committee was ordered to be served on the committee though he had passed his accounts, *Re Wylde*, 5 D. M. G. 25.

Where a trustee avoided service, the order was made upon service at the place mentioned in his affidavit, *Ex parte Baugham*, 16 Jur. 325, but see *Re Lawrence*, 14 W. R. 93. Service on a trustee may be dispensed with in a clear case, *Re Young*, 5 W. R. 400; *Re Beauclerk*, 11 W. R. 203; *Re Thomas, ibid.*, 276; and where the house named by trustees for service was pulled down, and the trustees had not been heard of for ten years, service of the petition on them was dispensed with, and an inquiry was directed to ascertain who were entitled to the fund, *Re Bolton*, 18 W. R. 56.

(2) As to dispensing with service on the ground that the party to be served is abroad and cannot be heard of, see *Re Hansford*, 7 W. R. 199, cited p. 67, *ante; Re Naylor*, 28 L. T. N. S. 18. Parties served, who claim no interest, should not appear, and if they do, will get no costs, *Re Smith*, 3 Jur. N. S. 659; *Re Birch*, 2 K. & J. 369; *Re Justices of Coventry*, 19 Beav. 158 (but see, *contra*, *Ex parte Queen's College*, 6 W. R. 9; *Rudge* v. *Weedon*, 11 W. R. 819). *A fortiori* incumbrancers appearing on a petition by a prior incumbrancer, where debt exhausted the fund in Court, in spite of a notice by the petitioner's solicitor that if they appeared the payment of their costs would be resisted, were held disentitled to costs, *Roberts* v. *Ball*, 24 L. J. Ch. 471. of *cestui que trusts;*

Where a tenant for life petitions for payment of *income*, remaindermen need not be served, *Re Whitling*, 9 W. R. 830; *Re Marner*, 3 L. R. Eq. 432; and trustees need not appear, *Re Evans*, 7 L. R. Ch. 619. So on a petition that the dividends might be paid to several tenants for life, and the several shares of the corpus carried over to the accounts of numerous remaindermen, *Re Hodges*, 6 W. R. 487, and see *Ex parte Fletcher*, 12 Jur. 619; *Strong* v. *Strong*, 6 W. R. 455; and in such cases it seems that leave may be given to serve some of the parties interested on behalf of the class, *Re Colson*, 2 W. R. 46. See 15 & 16 Vict. c. 86, s. 42, and Ord. XVI. rr. 9—11 (*post.* part II.). on petition by tenant for life;

Where a fund has been carried over to a separate account, the parties interested in the other shares need not be served (see *Re Hodgson*, 2 Eq. Rep. 1083; *Re Hawkes*, 18 Jur. 33); so a mortgaged share of funds paid into Court under the Act, may be paid to parties clearly entitled, in the absence of the parties interested in the other shares (*Re Bedford*, 21 L. T. 164; and see 15 & 16 Vict. c. 86, s. 51; and *Re Sharpley's Trusts*, 1 W. R. 217, where it was held that this section applied to proceedings under the Trustee Act, 1850). By analogy it would probably be held to apply to proceedings under this Act. of persons interested in other shares;

A married woman, having a power of appointment over a reversionary trust fund, appointed it by way of mortgage, with a power of sale, under which it was afterwards sold. Her husband became bankrupt, and, after the determination of the life estate, the trustees paid the fund into Court under this Act. The purchasers thereupon presented a petition for a transfer of the fund to them, which was served upon the trustees only. The Court made the order, subject to a direction that it should not be drawn up for a fortnight, and that the husband's assignees should be served with notice that the fund would be paid out if no objections were taken (*Ex parte Stutely*, 1 De G. & Sm. 703). of persons who *may* claim adversely.

On a reasonable application, in writing, by parties residing abroad, and served with notice of a petition under the Act, the Court may postpone the order for payment out of Court (*Re Hodgson's Will*, 22 L. J. Ch. 1055); but Parties residing abroad.

10 & 11 Vict. c. 96, s. 2.

the order as to service out of the jurisdiction, was held to apply to petitions (*Re Bonellis Telegraph*, L. R. 18 Eq. 655 ; *Re Haney*, L. R. 10 Ch. 275).

(*r*) See *Re Fozard*, and other cases, p. 71, *supra*, as to directing an action.

[Sect. III., regulating salary of Accountant-General, is repealed by the Chancery Funds Act, 35 & 36 Vict. c. 44, *post*. See pt. 2 of sched. 2.]

Lord Chancellor, with Master of the Rolls, &c., may make General Orders.

IV. And be it enacted, that the Lord Chancellor, with the assistance of the Master of the Rolls, or of one of the Vice-Chancellors, shall have power, and is hereby authorised, to make such orders as from time to time shall seem necessary for better carrying the provisions of this Act into effect (*s*).

(*s*) See now the Rules, *ante*.

Construction of expression "Lord Chancellor."

V. And be it enacted, that in the construction of this Act the expression "the Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners for the custody of the Great Seal of Great Britain for the time being.

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12 & 13 VICT. CAP. 74.

An Act for the further Relief of Trustees.

[28*th July*, 1849.

12 & 13 Vict. c. 74.

WHEREAS difficulties have arisen in the transfer of securities vested in trustees in certain cases under the provisions of an Act passed in the session of Parliament holden in the 10th and 11th years of the reign of her present Majesty, intituled "An Act for better securing trust funds, and for the relief of trustees," and it is expedient to make a further provision for carrying into effect the objects of the said recited Act: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said Act it shall appear to the judge of the Court of Chancery before whom such

petition shall be heard that any monies, annuities, stocks, or securities, are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said recited Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the major part of such persons without the concurrence of the other or others of them; and where any such monies or Government or Parliamentary securities shall be deposited with any banker broker, or other depositary, it shall be lawful for such judge as aforesaid to make such order for the payment or delivery of such monies, Government or Parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant General as to the said Judge shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money, or delivery of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the act of all the persons entitled to the annuities, stocks, or securities so transferred, or the monies or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order (*a*).

12 & 13 Vict. c. 74.

Court of Chancery may, upon application by majority of trustees, &c., order payment or transfer of trust monies, stocks, or securities into Court of Chancery.

(*a*) An order was made under this Act in *Re Broadwood*, 8 L. T. N. S. 632. The non-concurring trustees must be served with the petition, *Re Bryant*, 3 W. N. (1868) 123.

TRUSTEE ACT, 1850.

13 & 14 VICT. CAP. 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees (*a*).

[*5th August*, 1850.

13 & 14 Vict. c. 60.

(*a*) For the scope of the Act, see *Bristow* v. *Booth*, L. R. 5 C. P. 80, 91.

It provides for getting in the legal estate of *land* where trustees or mortgagees are lunatic (1850, ss. 3, 4, pp. 80—82), or infant (ss. 7, 8, pp. 83, 84), or trustees or heirs of mortgagees are out of jurisdiction, or survivor uncertain, or they or their heirs are not known (ss. 9—15, 19, pp. 84—87), or refuse to convey (1852, ss. 2, 3, p. 113);

Provisions as to *land*.

Where there is a contingent right in an unborn trustee (1850, s. 16, p. 87);

Copyhold or Duchy lands.

Where the lands are copyhold (1850, s. 28, p. 94), or in the Duchy of Lancaster and Durham (1850, s. 21, p. 90);

Stock.

And for vesting orders of *stock* where trustees, or mortgagees, or personal representatives are lunatic (1850, ss. 5, 6, pp. 82, 83; 1852, s. 6, p. 115), infant (1852, s. 3, p. 113), out of jurisdiction, or uncertain, or not known (1850, ss. 22, 25, pp. 90—92), or refuse to assign (1850, ss. 23, 24, pp. 91, 92; 1852, ss. 4, 5, p. 113);

Bank of England.

The bankers or companies are to be bound, see 1850, s. 26, p. 93;

Choses in action.

And for vesting orders of *choses in action* where trustees, or mortgagees, or personal representatives are lunatic (1850, s. 5, p. 82), or out of jurisdiction (1850, s. 22, p. 90), or refuse to sue 1850, ss. 23, 24, pp. 91, 92; 1852, s. 4, p. 114);

For the effect of such orders, see 1850, s. 27, p. 94;

Charity.

Orders as to trustees of charities are provided for, 1850, s. 45, p. 107;

Appointment of new trustees.

It provides for appointment of new trustees on petition, and the consequent conveyances and transfers, 1850, ss. 32—42, pp. 98—105;

For appointment of a person to convey or transfer if desirable, 1850, s. 20, p. 88;

Of persons to convey.

And for declaration that persons against whom a decree is made are trustees, 1850, ss. 29, 30, p. 95; 1852, s. 1, p. 112.

Money payable to infants or lunatics.

Money payable to infants or lunatics may be paid into Court under the act of 1850, s. 48, p. 108.

[Sect. 1 repeals 11 Geo. 4 & 1 Will. 4, c. 60; 4 & 5 Will. 4, c. 23; 1 & 2 Vict. c. 69.]

Interpretation of terms.

II. And whereas it is expedient to define the meaning in which certain words are hereafter used: it is declared that the several words hereinafter named are herein used and applied in the manner following respectively (that is to say)—

"Lands."

The word "lands" shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein (*b*):

"Stock."

The word "stock" (*c*) shall mean any fund, annuity, or

security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein: 13 & 14 Vict. c. 60, s. 2.

"Seised." The word "seised" (*d*) shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands:

"Possessed." The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity in possession or in expectancy, in any lands:

"Contingent." The words "contingent right," as applied to lands, shall mean a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

"Convey." The words "convey" and "conveyance," applied to any person shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to other lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the abolition of fines and recoveries, and the substitution of more simple modes of assurance," and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold land: 3 & 4 Wm. 4, c. 74.

"Assign." The words "assign" and "assignment" shall mean the execution and performance by a person of every

13 & 14 Vict. c. 60, s. 2.

necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate:

"Transfer." The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another:

"Lord Chancellor." The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the Great Seal for the time being:

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the Great Seal of Ireland for the time being:

Trustee not mortgagee. The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage (*e*); but, with this exception, the words "trust" and "trustee" (*f*)

Constructive trustee. shall extend to and include implied and constructive trusts (*g*), and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust (*h*), and shall extend to and include the duties incident to the office of personal representatives of a deceased person:

"Lunatic." The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ De lunatico inquirendo:

"Person of unsound mind." The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs :*

* See note to s. 3.

"Devisee." The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent

solely upon the operation of the laws concerning devise and descent: 13 & 14 Vict. c. 60, s. 2.

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate, which would in a Court of Equity be deemed merely a security for money (*i*): "Mortgage.

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate:

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things (*k*) and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

(*b*) As to "lands" including "rent charge," *Re Harrison*, cited Seton, 811. "Lands."

"Lands" do not include leaseholds in sect. 15, where the word "seised" is used, *Re Harvey*, Seton, 819; *Re Mundell*, 8 W. R. 683; but in *Re Mundell*, a vesting order was made under sect. 34, in which sect. the word "lands" includes leaseholds, *Re Matthews*, 2 W. R. 85; *Re Robinson*, 11 W. R. 1035.

(*c*) The word "stock" includes shares in a joint-stock banking company, *Re Angelo*, 5 De G. & S. 278, and shares in ships registered under the Merchant Shipping Act, 1854 (18 & 19 Vict. 91, s. 10). "Stock."

(*d*) See *Re Mundell, ubi supra.*

(*e*) Therefore a mortgagor cannot obtain an order for reconveyance or sale under the Act, without suit, under sections which relate only to trustees, *e.g.*, sect. 9, and see note (*n*) to sect. 30. *Re Osborn*, L. R. 12 Eq. 392. *Secus*, where land was conveyed, not strictly by way of mortgage, but by way of trust for sale in default of payment of money borrowed, see *Re Underwood*, 3 K. & J. 745. Or where the mortgagee has become a trustee, *Re Crowe*, L. R. 13 Eq. 26; *Re Watkin*, W. N. (1876) 232. Mortgagee not trustee within Act.

(*f*) The following persons have been held to be trustees within the Act:— Who is trustee.

The husband of a *feme covert* trustee (under sect. 5), *Re Wood*, 3 D. F. J. 126; and of an executrix (under sect. 22), *Ex parte Bradshaw*, 2 D. M. G. 900. Husband.

The executrix of a surviving trustee (under sect. 4 of the Extension Act), *Re Ellis*, 24 Beav. 426. Executrix.

A surviving executor (not a trustee) who died intestate, *Re Davis*, L. R. 12 Eq. 215.

An heir on whom trust estates descended by reason of the disclaimer of devisees in trust (under sect. 9), *Wilks* v. *Groom*, 6 D. M. G. 205; *Hooper* v. *Strutton*, 12 W. R. 367. Heir.

The heir at law of a deceased mortgagee (under sects. 9 and 15), in cases not within the 19th section, *Re Skitter*, 4 W. R. 791; *Re Underwood*, 3 K. & J. 745; *Re Keeler*, 11 W. R. 62, Lewin, 760, note (*a*). See now 37 & 38 Vict. c. 78, s. 4, by which the legal personal representative of a mortgagee may reconvey the legal estate. Heir of mortgagee.

An assignee of a bankrupt (under sect. 9), *Re Joyce*, L. R. 2 Eq. 576. Assignee in bankruptcy.

13 & 14 Vict. c. 60, s. 2.

As to the Act applying to a trustee with a mere power of sale, see note (*p*), page 81, on vesting orders.

Trustee for sale.

As to a mere dower trustee being a trustee within the Act, see *Collard* v. *Roe*, 4 De G. & J. 525, whence it seems that his interest might have been bound by a decree without any order under this Act.

Dower trustee.

(*g*) On the question whether a suit for specific performance, foreclosure, &c., is necessary before a mortgagor, or contracting party can be declared a constructive trustee, see note (*n*) to sect. 30, *post*, p. 96.

Vendors and mortgagors.

Constructive trustees.

(*h*) This includes an infant beneficially entitled to a fund subject to trusts for maintenance, *Gardner* v. *Cowles*, 24 W. R. 920.

"Unsound mind."

(*i*) See *Re Underwood*, cited in note *supra*; *Lawrence* v. *Galsworthy*, 3 Jur. N. S. 1049; *Re King*, 16 Jur. 1153.

(*k*) See *Re Hartnall*, cited in note to sect. 22.

Lunatic trustees and mortgagees of *lands.*

III. And be it enacted, that when any lunatic or person of unsound mind (*l*) shall be seised (*m*) or possessed of any lands upon any trust or by way of mortgage (*n*), it shall be lawful for the Lord Chancellor (*o*) intrusted by virtue of the Queen's Sign Manual with the care of the persons and estates of lunatics * to make an order that such lands be vested (*p*) in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*q*).

* See now Judicature Act, 1875, s. 7.

Lunacy disputed.

(*l*) When the lunacy is disputed a bill need not be filed, as in *Re Phillips*, Cr. & Ph. 147; but a commissioner may be fined if the Court thinks fit, sect. 52, *post*.

Where lunatic is infant.

Where an infant trustee is also of unsound mind, the case falls within the ordinary jurisdiction of the Court, *Re Arrowsmith*, 6 W. R. 742, 4 Jur. N. S. 1122.

Seised.

(*m*) The word "seised" includes an estate in tail, *Re Sherard*, D. J. S. 422.

(*n*) See now 37 & 38 Vict. c. 78, s. 4, allowing the reconveyance of mortgaged estates by the legal personal representative of the mortgagee.

Lunatic Trustees.

(*o*) The words "the Lord Chancellor" include the Lords Justices or other judges acting in lunacy, *Re Waugh*, 2 D. M. G. 279, and see sect. 7 of the Judicature Act, 1875, and the Trustee Extension Act, s. 11, p. 116, *post*, and *Re Arrowsmith*, 6 W. R. 742, 4 Jur. N. S. 1123.

Application when to be made in lunacy.

Whenever the trustee or mortgagee is of unsound mind, but not found a lunatic, the application under these Acts may be made to the Lord Chancellor in Chancery if the fund is already standing to the credit of a cause (see note to sect. 43; *Herring* v. *Clark*, L. R. 4 Ch. 167; *Harrison* v. *Smith*, 17 W. R. 646; see *Re Ferrior*, L. R. 3 Ch. 178); but if *no cause is pending*, the jurisdiction belongs not to the Court of Chancery, but to the Judges in Lunacy, unless the trustee is also an infant (see last note), *Re Good Intent Benefit Society*, 2 W. R. 671; *Re Davidson*, 20 L. J. Ch. 644; *Re Chauncey*, 14 W. R. 849; and comp. *Re Irby*, 17 Beav. 334, and the cases cited by Lord Justice Turner, in *Re Ormerod*, 3 De G. & J. 249, where it was held that the V.-C. of the Duchy of Lancaster has no power under the 17 & 18 Vict. c. 82, to appoint a new trustee in the place of a trustee of unsound mind, not found so by inquisition; see also *Re Owen*, 4 L. R. Ch. 782; *Re Mason*, 10 L. R Ch. 273; and sect. 10 of the Extension Act, *post*; and as to appointing a new trustee in place of a lunatic, see note (*s*), p. 100, *post*. As to the mode of applying where a fund standing in the name of a lunatic trustee is desired

Transfer from lunatic trustee

to be transferred to the credit of a cause, see *Re Dawson*, 6 N. R. 346, where *Jeffryes* v. *Drysdale*, 9 W. R. 428, is remarked upon. 13 & 14 Vict. c. 60, s. 3.

The order ought to be made in Chancery as well as lunacy in all cases where it is desired to appoint a new trustee, as the power in lunacy is restricted to making a vesting order, *Re Boyce*, 12 W. R. 359, and in *Re Stewart*, 8 W. R. 297, the Lords Justices, under one petition presented in Chancery and Lunacy, appointed new trustees in the place of one trustee of unsound mind, not found so by inquisition, one resident abroad, and one who was dead. To credit of a cause. To a new trustee.

As to service on the committee, see note to sect. 40. Service on committee.

(*p*) Vesting orders may be made in pursuance of decrees, see s. 30, *infra*, and Cons. Ord. XXXV. 1, p. 137, *post*.

Vesting orders should contain some description of the property comprised in them, *Re Ord*, 3 W. R. 386. VESTING ORDERS OF LAND.

The Court will make orders vesting lands to "such uses as a person shall appoint, and in default, to such person in fee," *Re Powell*, 4 K. & J. 338 (where the object was to save the expense of an acknowledgment by a *feme covert*, a mortgagee's executrix), or to uses in bar of dower (*Re Lush*, 5 De G. & Sm. 436; *Davey* v. *Miller*, 1 Sm. & G. App. xix.; overruling *Re Howard*, 5 De G. & Sm. 435); but will not, it seems, insert in an order a declaration barring dower under the new law (*Re Lush, loc. cit.*); see Seton, 818. To what uses. To uses in bar of dower.

An order was made to vest a legal estate outstanding in an infant mortgagee in the devisees of the mortgagor, subject to a legacy charged on the land by his will (*Re Ellerthorpe*, 18 Jur. 666; see *Re Winteringham's Trusts*, 3 W. R. 578, cited in note to sect. 34). Subject to legacy.

A vesting order was discharged and a conveyance directed, under s. 21, for the purpose of repressing reservations as to mines in *Turner* v. *Speakman*, Seton, 808; see *Langhorn* v. *Langhorn*, 21 L. J. Ch. 860. Or other reservations.

As to vesting orders creating a *joint* tenancy in new and continuing trustees, see note (*g*) to sect. 10, *infra*, p. 85. In joint tenancy.

It was held that vesting orders of land under the Act could only be made where the person from whom the *land* was to be *devested* had a legal estate, and not where he had a mere power, *Re Porter*, 3 W. R. 583; but the order was subsequently made in that case, see Seton, 818; and see *Re Boyce*, 12 W. R. 359; and compare *Re Rathbone*, L. R. 2 Ch. Div. 483, cited *infra*, as to vesting orders of personalty where there is no legal personal representative. Where no one has an existing estate.

As to the propriety of a vesting order where the interest to be assigned is only equitable, see note (*n*), p. 96. Equitable interest.

As to vesting orders of copyholds, see note (*i*), p. 95. Copyhold.

See s. 20, by which the Court may appoint a person to convey in certain cases instead of making a vesting order.

A vesting order may be made under the Act, even though there is no incapacity in the person seised of the legal estate to execute a conveyance, see *Re Manning*, Kay, App. xxviii. (under sect. 34); *Hancox* v. *Spittle*, 3 Sm. & Giff. 478.

As to costs of applications for vesting orders, see note (*l*), p. 109.

A vesting order of stock or other personalty can be made though the last trustee died intestate and had no personal representative, so that there is no existing interest to be vested, *Re Rathbone*, L. R. 2 C. D. 483, where *Re Mundell*, 8 W. R. 683, and *Re Driver*, L. R. 19 Eq. 352, were followed rather than *Re Dalgleish*, L. R. 1 Ch. Div. 46; and see *Re Dixon*, 21 W. R. 220. VESTING ORDERS OF PERSONALTY, though no one has an existing interest.

The vesting order binds the Bank (sect. 20 & 26, and sect. 6 of the Extension Act, p. 115, *post*,) but the Bank appealed successfully against an order vesting the right to transfer a *fractional part* of a dividend of stock, and the new trustees in that case were consequently enabled to receive the arrears of the dividends, and directed to retain only such part as was subject to the trust, *Re Stewart*, 8 W. R. 425. Nor will the Court generally vest the right to receive or transfer *future* dividends of stock in a person in whose name the stock is not standing, see *Re Hartnall*, 5 De G. & Sm. 111, and How far order to bind Bank of England.

13 & 14 Vict. c. 60, s. 3.

even where an order was made (under sect. 22) vesting the right to receive "dividends now due or hereafter to accrue due," in three out of four trustees, one being out of the jurisdiction, this order was, on the appeal of the Bank, varied by limiting the right of the three trustees to receive the dividends to their joint lives, *Re Peyton*, 25 Beav. 317 ; 2 De G. & J. 290.

Form of order.

The circumstances bringing the case within the Act should be shown upon the order, *Re Ellis*, 24 Beav. 426; *Re Mainwaring*, 26 Beav. 172.

Directions as to transfer.

The Court may give directions as to how the right to transfer is to be exercised, *e.g.*, may direct it to be paid into Court under the Trustee Relief Act ; see *post*, sect. 31, and note.

Vesting in *cestuis que trusts*.

The Court has vested the right to transfer stock, &c., in the cestuis que trusts themselves under this section and sect. 24 combined, see *Re White*, 5 L. R. Ch. 698.

Contingent rights of *lunatic* trustees and mortgagees of *lands*.

IV. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage (*r*), it shall be lawful for the Lord Chancellor, intrusted as aforesaid,* to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right (*s*).

* See note (*o*), p. 80.

(*r*) See note (*a*) to s. 7, *infra*, for the new statutes as to reconveyance of mortgaged estates.

(*s*) See notes to preceding section as to the jurisdiction in lunacy, and note (*p*) last page, as to vesting orders.

Stock and *chose in action* of *lunatic* trustees and mortgagees.

V. And be it enacted, that when any lunatic (*t*) or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor intrusted as aforesaid (*u*) to make an order vesting* in any person or persons the right to transfer such stock, or to receive the dividends or income thereof (*x*) or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting* the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any

* See note (*p*), p. 81.

* See note (*p*), p. 81.

interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint. 13 & 14 Vict. c. 60, s. 5.

(*t*) Or husband of a female lunatic trustee, see note (*f*) to sect. 2. Who is trustee.

(*u*) As to lunatic trustees, see note (*o*) to sect. 3.

(*x*) These words only authorised the Court to vest in persons the right to transfer stock to themselves, and not to other persons; but this defect was supplied by sect. 6 of the Extension Act, p. 115, *post.* Lunacy jurisdiction.

VI. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting * the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons he may appoint (*y*). *Stock* of deceased persons in name of *lunatic* personal representative.

* See note (*p*), p. 81, *ad finem.*

(*y*) See the notes to last section.

VII. And be it enacted, that where any infant shall be seised (*z*) or possessed of any lands upon any trust or by way of mortgage (*a*), it shall be lawful for the Court of Chancery * to make an order vesting † such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*b*). *Estates* of *infant* trustees and mortgagees of land.

* See Judicature Act, 1873, s. 34 (2).

† See note (*p*), p. 81.

(*z*) Seised includes an estate tail (note in *supra.*)

Infants no longer have a day to show cause, *Bennett* v. *Harfoot,* 19 W. R. 428.

(*a*) As to what words in a will are sufficient to carry estates held on trust or mortgage, and to prevent their descending on infant, &c., heirs, see Lewin, and *Re Arrowsmith,* 6 W. R. 642; *Re Finney,* 3 Giff. 465; *Lysaght* v. *Edwards,* L. R. 2 Ch. Div. 499; and see 37 & 38 Vict. c. 78, s. 4, and 38 & 39 Vict. c. 87, s. 48, as to reconveyances of mortgaged and trust estates by the legal personal representative of the mortgagee or bare trustee, and note (*h*), p. 87, *infra.* Reconveyance of mortgaged and trust estates. Death of *bare trustee* intestate.

(*b*) An order vesting the legal estate of an infant remainderman in tail, made with the consent of the tenant for life, as protector, will bar the entail Order barring entail.

13 & 14 Vict. c. 60, s. 7.

(*Powell* v. *Matthews*, 1 Jur. N. S. 973; and for form of order, *Williams* v. *Roker*, Seton, 809; cf. *Hargreaves* v. *Wright*, 1 W. R. 408; *Singleton* v. *Hopkins*, 4 W. R. 107; *Re Bloomar*, 2 De G. & J. 88. In *Beale* v. *Symonds*, cited in 2 Davidson's Conveyancing, 214 n., an order for an infant to convey an estate tail was made under 11 Geo. 4 & 1 Wm. 4, c. 47, which is not repealed; but in another case an order was made under the 16th sect. (*infra*), discharging an estate from contingent rights of unborn tenants in tail, and appointing a person to convey in place of an infant tenant in tail, *Hargreaves* v. *Wright*, cited in note to sect. 16.

Contingent rights barred under sect. 16.

Contingent rights of *infant* trustees and mortgagees in land.

VIII. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage (*c*) it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right (*d*).

(*c*) See note (*a*) to s. 7, *supra*.

(*d*) See last note, and as to contingent rights of *unborn* persons, see sect. 16.

Trustees of land *out of the jurisdiction* of the Court in land.

IX. And be it enacted, that when any person solely seised or possessed of any lands upon any trust (*e*) shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order vesting * such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*f*).

* See note (*p*), p. 81, *ante*.

(*e*) As to heirs, &c., being constructive trustees, see note (*f*) to sect. 2 (p. 79, *ante*).

A mortgagee is not a trustee within the section, *ibid.*

Mortgagor out of jurisdiction declared trustee under section.

(*f*) An absconding mortgagor was declared a trustee for the mortgagee after a decree for foreclosure upon motion under this section, *Lechmere* v. *Clamp*, 31 Beav. 578; see 30 Beav. 218; but such a declaration could only be obtained on a separate application (*Smith* v. *Boucher*, 1 Sm. & G. 72; see the 30th section, and note (*n*) thereto, and *Re Underwood*, 3 K. & J. 745, cited in note (*f*), p. 79, *supra*).

Trustee out of jurisdiction.

For cases where the trustee being out of the jurisdiction it has been held expedient to appoint a new trustee, see note to sect. 32, p. 99, *infra*.

13 & 14 Vict. c. 60, s. 10.

Where persons are *seised* of *lands* jointly with parties *out of jurisdiction* of Court, &c.

X. And be it enacted, that when any person or persons shall be seised or possessed of any lands (*y*) jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting * the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct: and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

* See note (*p*), p. 81.

(*y*) The words "upon any trust" seem to have been accidently omitted. A mortgagee is not a trustee within the section; *Re Osborne* cited p. 79, *ante*.

When one of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the Court will vest the outstanding legal estate in the continuing and new trustee as *joint tenants* (*Smith* v. *Smith*, 3 Drew. 72; *Re Fisher*, 1 W. R. 505, overruling *Re Watt's Settlement*, 9 Hare, 106; *Re Plyer's Trust*, 9 Hare, 220), even though the new trustee is not appointed by the Court, *Re Marquis of Bute's Will*, Johns. 15. This section was held to apply where a trust descended upon co-parceners of whom one was out of jurisdiction, *Re Templer*, 4 N. R. 494.

Estate vested in continuing and new trustees as joint tenants.

When the property consisted of *stock*, an order appointing new trustees and vesting the stock in them was made under s. 34, *Re Clay*, W. N., 1873, p. 129.

Contingent rights of trustees *out of jurisdiction* in *lands*.

XI. And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Where persons are jointly entitled with others *out of the jurisdiction* of the Court to a *contingent right* in *lands*.

XII. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the

13 & 14 Vict. c. 60, s. 12.

jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

When it is *uncertain* which of several trustees was the *survivor, lands* may be vested.

XIII. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting* such lands in such persons or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

* See note (*p*), p. 81.

When it is *uncertain* whether the last trustee of *land* be *living* or dead.

XIV. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting* such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

* See note (*p*), p. 81.

When *trustee* of land dies *without an heir.*

XV. And be it enacted, that when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir (*h*), or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting* such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

* See note (*p*), p. 81.

(*h*) See now 37 & 38 Vict. c. 78, and 38 & 39 Vict. c. 87, s. 48, by which on the death of any bare trustee intestate as to any hereditament, such hereditament vests in the legal personal representative, and see *Christie* v. *Ovington*, L. R. 1 Ch. Div. 281, as to "bare trustees." 13 & 14 Vict. c. 60, s. 15.

Land in this section does not include leaseholds, see note (*b*), p. 79, *ante*. Trustee of leasehold.

When the surviving trustee dies without leaving a personal representative an order may be made under s. 25, q. v., but see *Re Rathbone*, L. R. 2 C. D. 483, cited p. 81, *supra*.

XVI. And be it enacted, that when any lands are subject to a contingent right in an unborn person (*i*) or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands. *Contingent right* of *unborn* trustee [in *lands*].

(*i*) See a similar provision in s. 30, *infra*, for discharge of contingent rights in a suit. There "unborn persons" are held to include persons who cannot be ascertained, *e.g.*, heirs of a living person, note (*o*), p. 97, *post*. Discharge of contingent rights in suits.

[The 17th and 18th sections of this Act are repealed by the "Trustee Extension Act, 1852," s. 2, *post*, p. 113.] Sects. 17 & 18.

XIX. And be it enacted, that when any person to whom any lands have been conveyed by way of mortgage shall have died (*k*) without having entered into the possession or into the receipt of the rents and profits thereof (*l*), and the money due in respect of such mortgage shall have been paid (*m*) to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such land, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting* such lands in such person or persons in such manner and for such estate as the said Court shall direct; (that is to say), Heir or devisee of mortgagee of land.

* See note (*p*) p. 81.

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found: [*Out of jurisdiction.*]

When an heir or devisee of such mortgagee shall upon a demand by a person entitled to require a convey- [*Refusing* to convey.]

13 & 14 Vict. c. 60, s. 19.

ance of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person.

[*Uncertain.*] When it shall be uncertain which of several devisees of such mortgagee was the survivor:

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead:

[Intestate and *without heir.*] When such mortgagee shall have died intestate as to such lands, and without an heir (*k*), or shall have died and it shall not be known who is his heir or devisee (*n*):

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee (as the case may be) had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Reconveyance by mortgagees' personal representative.

(*k*) By 37 & 38 Vict. c. 78, s. 4, the legal personal representative of a mortgagee of freeholds or copyholds may reconvey the legal estate of the mortgaged property upon being paid the sums secured by the mortgage.

Mortgagee in possession.

(*l*) Where the mortgagee had entered into possession, a vesting order was made under sect. 15 ; *Re Skitter* and *Re Keeler*, cited in note (*f*), *supra*, p. 79.

Where mortgage money is unpaid.

(*m*) See *Re Meyrick's Estate*, 9 Hare, 116, where it seems to have been thought by V.-C. Turner, that this section did not apply where the mortgage-money was unpaid ; and though in *Re Boden*, 1 D. M. G. 57 ; s.c. 9 Hare, 820 (followed in *Re Quinlan*, 9 Ir. Ch. R. 306, and *Re Lea's Trusts*, 6 W. R. 482), the Court under this section—the mortgage debt remaining unpaid—made an order vesting the mortgage estate in such executors, subject to the equity of redemption (see *Re Skitter*, 4 W. R. 791, decided under the 9th section). It appears from *Re Hewitt*, 27 L. J. Ch. 302 (decided by the full Court of Appeal), that such an order will not be made, unless it is intended to sell or to transfer the mortgage. See also *Re Dearden*, 3 M. & K. 508.

(*n*) See as to the right of the Crown to escheat, note (*h*), sect. 46, *infra*.

Power to appoint a person

XX. (*o*) And be it enacted, that in every case where the Lord Chancellor, intrusted as aforesaid, or the Court

of Chancery, shall under the provisions of this Act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery (as the case may be), should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right (*p*); and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock (*q*) transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established, or to be established; it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary, or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this Act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto.

13 & 14 Vict. c. 60, s. 20.

to convey in certain cases.

(*o*) As to the Court ordering a conveyance instead of making vesting orders, see *Turner* v. *Spackman*, cited note (*p*) to sect. 8, p. 81, *supra*.

13 & 14 Vict. c. 60, s. 20.

Form of order under s. 20.

(*p*) For the form of the conveyance in such cases, see *Ex parte Foley*, 8 Sim. 395, and for form of order, *Hancox* v. *Spittle*, 3 Sm. & G. 478; *Shepherd* v. *Churchill*, 25 Beav. 21. Where the interests to be conveyed under a partition decree were numerous, and it was convenient to appoint one person to convey to all, see also *Hubbard* v. *Hubbard*, 2 H. & M. 38, 41.

Stock.

(*q*) When stock is in question, the officer of the Bank should be directed to make the transfer, and in such cases no other person need be directed to join with him in the transfer; but see *Coles* v. *Benbow*, W. N. 1873, 60 and for orders which the Bank has resisted, see note (*p*), p. 81.

As to lands in Lancaster and Durham.

XXI. And be it enacted, that as to any lands situated within the Duchy of Lancaster or the Counties Palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster (*r*), or the Court of Chancery in the County Palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same Courts respectively, as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palantine of Lancaster, or the Court of Chancery in the County Palantine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: Provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local Courts to be an absent trustee or mortgagee within the meaning of this Act.

& 18 Vict. . 82, s. 11.

(*r*) See now 17 & 18 Vict. c. 82, s. 11, which extends all the powers of this and the Extension Act to property in the County Palatine of Lancaster. But the Act does not give the Vice-Chancellor of the Duchy Court jurisdiction in lunacy (*Re Ormerod*, cited in note (*o*) to sect. 3, p. 80).

When trustees of *stock* or *chose in action out of the jurisdiction*, or otherwise *uncertain*.

XXII. And be it enacted, that when any person or persons (*s*) shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said Court to make an order vesting * the right to transfer such stock, or to receive the dividends or income thereof (*t*), or to sue for or recover such chose in action, or any interest in

* See note (*p*), p. 81.

respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint (*u*); and when any sole trustee (*x*) of any stock or chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof (*t*) or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint. 13 & 14 Vict. c. 60, s. 22.

(*s*) See *Ex parte Bradshaw*, and other cases cited in note (*f*) to sect. 2. This section does not apply to trustees out of the jurisdiction incapacitated by lunacy, infancy, or otherwise, see *Cramer* v. *Cramer*, 16 Jur. 331. Who is trustee.

(*t*) See note (*p*) to section 3, p. 81, *ad finem*.

(*u*) It seems to have been held, that the Court will not, under this section, vest the chose in action in the *cestuis que trusts* themselves (*Re Brass's Trusts*, 4 W. R. 764), *Re Nicholl*, cited note (*e*), *infra*; but see *Ex parte Bradshaw*, 2 D. M. G. 900. In *Re Ryan's Settlement*, 9 W. R. 137, V.-C. S., a trust fund was vested in the *cestui que trust*, who had become absolutely entitled. In the case of stock, the officer of the Bank will be ordered to transfer, *Coles* v. *Benbow*, W. N. (1873) 60. See Lewin. 763, note (*a*), and cases cited in note (*p*), p. 81, *ad finem*. Orders vesting stock. Vesting in *cestuis que trusts*.

(*x*) Where the master found that it was uncertain whether A., one of two trustees, was living or dead, but that B. his co-trustee, was dead, the Court refused to treat A. as a "sole trustee," within this section, it being uncertain whether he had survived the other, *Re Randall*, 1 Drew. 401. The case of two trustees was held not to be within the meaning of "sole trustee," *Re Spawforth*, 12 W. R. 978, but doubt is thrown on that case in Lewin, 763, note (*c*). And two representatives of a sole trustee are within the section, *Re Hartnall*, 5 De G. & Sm. 111). "Sole trustee."

XXIII. (*y*) And be it enacted, that where any sole trustee (*z*) of any stock or chose in action * shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled (*a*) thereto for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting * the sole right to transfer such stock, or to receive the dividends or income thereof (*b*), or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint (*c*). When trustee of *stock* or *chose in action refuses to transfer*.

* For similar provisions in case of lands, see Act of 1852, s. 2.

* See note (*p*), p. 81.

13 & 14 Vict. c. 60, s. 23.

(*y*) The 4th section of the Extension Act extends the provisions of this section to the case of a trustee neglecting to obey an order of the Court, see *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338.

"Sole trustee."

(*z*) See note (*x*) to last section, as to two or more trustees being included in this expression..

"Person absolutely entitled."

(*a*) These words include new trustees of the stock sought to be transferred, *Re Russell's Trusts*, 1 Sim. N. S. 404. But not one of two trustees, nor a tenant for life (*Mackenzie* v. *Mackenzie*, *ubi sup.*).

Service on recusant trustee.

(*b*) The refusing trustee need not be served, *Re Baxter's Will*, 2 Sm. & G. App. v.; *Ex parte Armstrong*, 16 Sim. 296; *Re Crowe*, L. R. 13 Eq. 26.

(*c*) See note (*x*) to sect. 5, p. 83, *ante*.

When one of several trustees of *stock refuses to transfer* or receive and pay over dividends.

XXIV. And be it enacted, that where any one of the trustees of any stock, or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof (*d*), or to sue for and recover such chose in action, in the other trustee or trustees (*e*) of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

(*d*) See note (*x*) to sect. 5, p. 83, *ante*.

(*e*) The Court could not vest the rights of the trustees in the persons beneficially entitled, even where two were unwilling to transfer and the third was a lunatic, *Re Nicholl*, 18 W. R. 443. See note (*u*) to s. 22, *supra*.

When *stock* is standing in the name of a deceased person, and the personal representative is *out of jurisdiction*, &c.

XXV. And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereunto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order (*f*) vesting* the right to

* See note (*p*), p. 81.

transfer such stock, or to receive the dividends or income thereof (*g*), in any person or persons whom the said Court may appoint. 13 & 14 Vict. c. 60. s. 25.

(*f*) Where the survivor of two trustees of stock died, leaving no personal representative, V.-C. Wickens appointed the person beneficially entitled a trustee under this section, *Re Dixon*, 21 W. R. 220, see note (*p*), p. 81, *ante*, and *Re Rathbone* there cited.

(*g*) See note (*x*) to sect. 5, p. 83, *ante*.

Effect of an order vesting the legal right to transfer stock.

XXVI. And be it enacted, that where any order shall have been made under any of the provisions of this Act, vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order: and the Bank of England * (*h*), and all companiesand associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter

* See also s. 6 of the Extension Act, p. 115, *post*.

13 & 14 Vict. c. 60, s. 26.

whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

(*h*) See note (*x*) to sect. 5, p. 83, *ante*.

Effect of an order vesting legal right in a chose in action.

XXVII. And be it enacted, that where any order shall have been made under the provisions of this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action, or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order vesting copyhold lands, or appointing any person to convey copyhold lands.

XXVIII. And be it enacted, that whensoever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor (*i*) whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands (*k*), it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor, and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assur-

ance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments. 13 & 14 Vict. c. 60, s. 28.

(*i*) See note (*p*), p. 81, as to vesting orders generally. Copyholds vested with or without consent of lord.

This section dispenses with the necessity of surrender and admittance, where a vesting order is made with the lord's consent, but it does not require such consent, and where such consent is not given, the lords of the manor ought not to be served with the petition, for the order is without prejudice as to his rights, *Re Flitchcroft*, 1 Jur. N. S. 418; *Re Howard*, 3 W. R. 605; *Paterson* v. *Paterson*, L. R. 2 Eq. 31; *Re Hurst* (Seton, 799); *Ayles* v. *Cox*, 17 Beav. 584.

As to the fine payable to the lord on substitution of a trustee under this Act, see *Bristow* v. *Booth*, 5 L. R. C. P. 80. Fine payable.

It is settled that the lord need not appear in court to consent (*Ayles* v. *Cox*, *ubi supra*; *Cooper* v. *Jones*, 25 L. J. Ch. 240, where a verified certificate of his consent was treated as sufficient).

(*k*) For a form of an order appointing a person to convey under this section, vid., *Re Hey's Will*, 9 Hare, 221, and Seton, 798; and as to the application of the Act to copyholds, *Re Collingwood*, 6 W. R. 536. Form of order.

The Queen's Bench issued a mandamus to enforce an order made under the section, *In re Lane*, 12 W. R. 710.

XXIX. And be it enacted, that when a decree shall have been made by any Court of Equity, directing the sale of any lands for the payment of the debts of a deceased person (*l*), every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this Act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person (*m*). When a decree is made for sale of real estate for payment of debts.

(*l*) For form of order under this section, see Seton, 799. The provisions of this section are also extended to decrees for sales for payment of costs, &c. (as to which see *Weston* v. *Filer*, 5 De G. & Sm. 608); by sect. 1 of the Extension Act, where the words are "for any purpose whatsoever," see 15 & 16 Vict. c. 86, s. 55, *post*. Trustee under decrees for sale.

(*m*) When copyholds, devised to an infant for life, with remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator; and an order was made in the cause, and pursuant to 11 Geo. 4 & 1 Wm. 4, c. 47 (note (*b*), p. 83, 84), that the infant's guardian should surrender them to the purchaser, it was held the purchaser might require the contingent right of the unborn issue of the infant to be discharged by an order under this section (*Wood* v. *Beetlestone*, 1 K. & J. 213, marginal note). Contingent rights discharged.

The application under this section must be to chambers (Cons. Order XXXV. r. 1, art. 4, p. 137, *post*. Application in chambers.

XXX. And be it enacted, that where any decree (*n*) Court to declare what

13 & 14 Vict. c. 60, s. 30.

parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons (*o*) who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of this Act; and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court or the said Lord Chancellor might under the provisions of this Act make concerning the estates, rights, and interests of trustees born or unborn.

Order in the suit.

(*n*) Orders under this section may be made in an action without any separate proceeding under the Act, *Harrison* v. *Smith*, 17 W. R. 646.

In chambers.

Applications under this section must be in chambers, Cons. Ord. XXXV. r. 1 (4), p. 137, *post*.

Decree binding equitable interests.

It has been held that no vesting order is necessary to bind equitable interests which are affected by a decree, *Re Williams*, 5 De G. & S. 515, unless the constructive trustee is out of the jurisdiction, see *Lechmere* v. *Clamp*, 31 Beav. 578.

Decree for specific performance.

The Court has a *discretion* to declare a constructive trust by *order* on *petition* under the Act *without decree* in a suit, *Re Angelo*, 5 De G. & Sm. 278; where a mortgagor of shares resident out of the jurisdiction, was declared a constructive trustee for the person to whom the shares were sold by the mortgagee upon the petition of such purchaser without suit. If it is desired to have a vendor or mortgagor declared a trustee for a purchaser within the section, such declarations cannot be obtained without action, unless the contract is executed by payment of purchase-money, &c., *Re Cuming*, L. R. 5 Ch. 72.

When a constructive trust can be declared without decree.

Thus the infant heir of an alleged vendor could not be declared a constructive trustee for the purchaser, where the contract concerned *realty*, until the rights had been ascertained by a suit, *Re Carpenter*, Kay, 418; see *Re Weeding*, 4 Jur. N. S. 707; *Cust* v. *Middleton*, 9 W. R. 242; *Re Draper*,

9 W. R. 805; *Re Burt*, 9 Hare, 289, where the Court refused, on application under the Act without suit, to declare the infant heir of a deceased partner, whose surviving partner had exercised a right of purchasing the partnership property given to him by the articles of partnership, a constructive trustee for the surviving partner; and in *Collinson* v. *Collinson*, 3 D. M. G. 409, the Court would not make an order on petition, declaring a son trustee for the father of property purchased in the son's name, though shortly after it made a decree to that effect in the suit, but compare *Re De Visme*, 2 D. J. S. 17. 13 & 14 Vict. s. 60, s. 30.

But where a contract for purchase is executed, as for example, where the purchase-money has been paid, the vendor or his heir will be declared a trustee under the Act without suit, *Re Cuming*, 5 L. R. Ch. 72 (following *Re Collingwood*, 6 W. R. 536 there cited; see *Re Crowe*, 13 L. R. Eq. 26; *Re Taylor*, W. N. (1866) 5). So, where the equitable estate was clearly in the petitioner, *Re Wilkinson*, 12 W. R. 522. So where a testator directed his executors to sell lands and apply the money, and before his death contracted to sell the lands, the Court made an order vesting the estate outstanding in his heir in the executors, *Re Badcock*, 2 W. R. 386. So, where a vendor died before completion of a compulsory sale to a railway company, his heir was held a constructive trustee without bill filed, *Re Russell*, 12 Jur. N. S. 224; *Re Lowry*, L. R. 15 Eq. 78, and again where lands purchased with the money of a railway company had been conveyed to two persons as tenants in common without any express declaration of trust, it being clearly proved that the lands were only held in trust, the Court treated the infant heir of one of the tenants in common who died, as a trustee for the company within the Act, *Re Brancker*, V.-C. W., Jan. 14, 1859. Vendor a constructive trustee.

Compare *Lysaght* v. *Edwards*, L. R. 2 C. D. 499; where the question how far the vendor, who dies before completion, is a trustee for the purchaser, is fully considered.

One object of the section is said to have been to obviate the necessity of inserting, in decrees of foreclosure made against infants, a day for the infant to show cause against the decree; but see *Newbury* v. *Marten*, 15 Jur. 166. In *Bowra* v. *Wright*, 4 De G. & Sm. 265, which was a *partition* suit, the Court declared the infant a trustee of such of the shares as were allotted to other parties. See now s. 7 of the Partition Act, 1868, *post*, and *Re Bloomar*, 2 De G. & J. 88; and *Re Molyneux*, 10 W. R. 512, where, on a decree for partition being made against a lunatic tenant in tail, declaring her a trustee of certain hereditaments, the committee declining to take any steps to complete the partition, a vesting order was made under this section and the Lunacy Regulation Act, 16 & 17 Vict. c. 70; and in *Shepherd* v. *Churchill*, 25 Beav. 21; where the shares of the parties to a partition suit were very minute and complicated, the Court declared each of the parties trustees as to the shares allotted to the other of them, and vested the whole in a single trustee, with directions to convey to each of the parties their allotted shares (see form of order, and comp. *Orger* v. *Sparke*, 9 W. R. 180; and *Hubbard* v. *Hubbard*, 2 H. & M. 38). Infant defendant. Decree of foreclosure against infants. Partition suits. Partition decree. Lunatic defendants.

(*o*) As to the power of the Court to bind unborn persons, see *Hargreaves* v. *Wright*, 1 W. R. 408; where on a bill filed by purchasers from a father and son having a joint power of appointment under a settlement, against the infant heir in tail of the son, who had died before the completion of the purchase, the Court made an order discharging the estate from the contingent rights of the unborn claimants under the settlement, and appointing a person to convey in the place of the infant, cf. *Wake* v. *Wake*, 1 W. R. 283, 17 Jur. 745. The word unborn is used in a large sense, and includes the right heirs of living persons who cannot be ascertained, and therefore cannot be made parties to a suit, *Barnett* v. *Moxon*, 20 L. R. Eq. 182; *Lees* v. *Coulton*, L. R. 20 Eq. 20. Unborn persons. Form of order in partition suits.

XXXI. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court Power to make directions how the

13 & 14 Vict. c. 60, s. 31.

right to transfer stock is to be exercised.

of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced (*q*).

Stock ordered to be transferred into Court.

(*q*) The Court may order the person to whom a fund is paid, to pay it into Court under the Trustee Relief Act; see *Re Thornton*, 9 W. R. 475; *Re Draper*, 9 W. R. 805; but an order for payment direct into Court will not be made, *Re Parby*, 29 L. T. 72; see, however, *Re Pitt*, 1 Jur. N. S. 1155, and *Re Dawson*, cited note (*t*), p. 101, *post*.

Power to Court to make order appointing new trustees.

XXXII. And be it enacted, that whenever it shall be expedient to appoint a new trustee or new trustees (*r*) and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery (*s*), it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees (*t*).

New trustees of composition deed.

(*r*) New trustees of a composition deed for the benefit of creditors were appointed in *Re Price's Trust*, L. R. 6 Eq. 460; *Re Bache*, 3 W. N. (1868) 223; *Re Raphael*, 9 L. R. Eq. 233; *Re Thomson*, 10 L. R. Ch. 55, and see *Re Waddall's Contract*, L. R. 2 C. D. 172, and new trustees in place of those appointed under the Settled Estates Act, *Scott* v. *Hersch*, 24 W. R. 108.

Appointments of new trustees of *charities* may be obtained by summons in chambers under the Charitable Trusts Act, 1853, see *Re Conyer's School*, 10 Hare, App. v.; or in simple cases, and where the income is under 50*l*., by application to the Charity Commissioners under the Act of 1860, and the property may be vested under sect. 45 of this Act, p. 107, *post*, and see Cons. Ord. XLI. 10—13, *post*; and for the County Court jurisdiction where

Upon petition.

the property is under 500*l*., see 28 & 29 Vict., c. 99, s. 1; but the jurisdiction of the Court to act *upon petition* is preserved concurrently.

Fiat of Attorney-General.

The Court would not formerly, under this section, appoint new trustees of charities, without the fiat of the Attorney-General, see *Re Rolles' Charity*, 3 D. M. G. 153; *Re Lancaster Charities*, 9 W. R. 192; *Att.-Gen.* v. *Cooper*, 10 W. R. 31. But this rule has not always been adhered to.

Form of application.

Applications for the appointment of new trustees of a charity should be entitled in Sir S. Romilly's Act, 52 G. 3, c. 101, cited in Lewin (*Re Rolles' Charity* (ubi sup.), *Re Bierton Charity Land*, 10 Hare, App. xxxviii.), and in the Trustee Act, and such other Act as is applicable, *e.g.* the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, *Re the Gloucester Charities*, 10 Hare, App. iii.

Sanction of charity commissioners.

The sanction of the Charity Commissioners and the fiat of the Att.-Gen. are both to be applied for, *Re Rolles' Charity*, 3 D. M. G. 153; *Re Warwick Charities*, 1 Phil. 559; *Re Lancaster Charities*, 9 W. R. 192, but where the application is in a pending action or matter, the consent of the Charity

Commissioners is not necessary, see p. 65, *ante*, and *Re Jarvis's Charity*, 1 Dr. & Sm. 97. 13 & 14 Vict. c. 60, s. 32.

New trustees of an alien's will were appointed, the Crown not opposing, *Re Martinez*, W. N. (1870) 70; see *Re Giraud*, 32 Beav. 385; and see now 33 & 34 Vict. c. 14, s. 2, enabling aliens to hold property. NEW TRUSTEES.

(*s*) This section only provides machinery in cases where, on the face of the instrument, it appears difficult, impracticable, or inexpedient to act without the Court's aid; and does not give the Court jurisdiction to consider the validity of the instrument or the conduct of trustees on petition. The Court will not on petition enter into—

(1) The Court will not consider the question of validity, *Re Matthews*, 26 Beav. 463; *Re Harrison*, 22 L. J. 60; Sugden on Real Property Statutes, 434 note; and see *Att.-Gen.* v. *Ward*, 6 Hare, 477, where the deed declaring the trusts had not been enrolled (as it should have been), but the Court appointed new trustees, the old trustees admitting the trusts. (1) Validity of instruments;

(2) The Court will not, on petition, appoint a new trustee on any ground not appearing on the face of the instrument; *e.g.*, on the ground of the trustee's misconduct, *Re Bridgman*, 1 Dr. & Sm. 164; *Legg* v. *Mackrell*, 1 Giff. 165; or because of disagreements between the trustee and *cestui que trust*, *Forster* v. *Davies*, 4 D. F. J. 131; or because the donee of the power is about to exercise it corruptly, *Re Hodson*, 9 Hare, 118; *Re Hadley*, 5 De G. & Sm. 67; see Lindley on Partnership, 605—6. (2) Misconduct of trustees.

Nor will the Court, on petition under the section, remove a trustee without or against his consent, *Re Blanchard*, 3 D. F. J. 131, 9 W. R. 647; *Re Garty*, 10 L. T. N. S. 331; *Re Dennis*, 12 W. R. 575. In such cases a bill must be filed, see Lewin, ch. xxvi. p. 604; but see *Re Byrne*, 18 L. T. N. S. 630; where a trustee showed by his conduct that he declined to act, *Re Bignold*, W. N. (1872) 30. Cases: (A) where *expedient* to appoint new trustees.

The Court has considered it expedient to exercise its statutory powers of appointing new trustees in the following cases:

Where a vesting order could not otherwise have been obtained; thus at the instance of the Bank of England, a fund which belonged to the Lords of the Regency of Hanover, who ceased to exist as a corporation on the annexation by Prussia, was transferred by the intervention of trustees appointed by the Court, *King of Hanover* v. *Bank of England*, 8 L. R. Eq. 350; but see note (*p*), p. 81, for vesting orders made when there was no one who had an existing estate or interest, and *Re Driver* and *Re Rathbone* there cited. For transfer by Bank of England.

Where there was great difficulty in obtaining administration to a deceased trustee, *Re Matthews*, 26 Beav. 463; *Davis* v. *Chanter*, 6 W. R. 415. Difficulty in administering to deceased trustee;

Where one of two trustees for sale was an infant (*Re Porter*, 2 Jur. N. S. 349). And the Court will generally appoint a new trustee in the place of an infant, even though appointed by the testator himself (*Re Gartside*, W. N. (1866) 196). infancy;

For the practice where a trustee becomes lunatic, see note (*o*), p. 80; and see *Re East*, L. R. 8 Ch. 735.

It has been held, that the mere fact of a trustee residing out of the jurisdiction of the Court is not always a ground for holding it expedient to appoint another in his place, *Re Mais*, 16 Jur. 608; *Re Moravian Society*, 26 Beav. 101; *Re Watt's Settlement*, 9 Hare, 106; *Withington* v. *Withington*, 16 Sim. 104, where a trustee who had gone to reside in China was held not to be incapable of acting; and see *Re Blanchard*, and other cases, *supra*. But see *Mennard* v. *Welford*, 1 Sm. & G. 426, where a trustee, residing permanently abroad, was pronounced by V.-C. Stuart incapable of acting as a trustee of property in England; and *Re Guibert*, 16 Jur. 852; *Re Stewart*, 8 W. R. 297; *Re Joyce*, 2 L. R. Eq. 576; *Re Bignold*, W. N. (1872) 31. residence abroad;

In cases, where a trustee has become bankrupt, the Court holds it expedient to appoint a new trustee, and the Court of Chancery has jurisdiction in such a case, under the Bankruptcy Act, 1869, sect. 117, as interpreted by V.-C. Wicken's in *Coombes* v. *Brookes*, L. R. 12 Eq. 61; *Re Bridgman*, 1 Drew. & Sm. 164; *Harris* v. *Harris*, 29 Beav. 107; *Re Roche*, 2 H. L. Ca. 460; *Re* bankruptcy. Under 24 & 25 Vict. c. 134.

13 & 14 Vict. c. 60, s. 32.

Renshaw, 4 L. R. Ch. 783; *Re Barker*, L. R. 1 Ch. Div. 43; and it should be remembered that property vested in a bankrupt as a bare trustee does not pass to his trust.

Felony.

As to appointing a new trustee in place of a person convicted of felony, see "Trustee Extension Act, 1852," *post*, s. 8.

(B). Where *impracticable* to appoint without Court's aid:

Cases where it is impracticable to appoint new trustees without the aid of the Court arise, where there is a power given by an instrument for appointment of new trustees, but either (1) the donee of the power is incapacitated by lunacy or other causes, or (2) the words of the power do not apply to the case which has arisen.

(1) Where *donee of power* lunatic.

16 & 17 Vict. c. 70.

(1) Where the incapacity of the donee arises from lunacy, the application may be made under the Lunacy Regulation Act, 16 & 17 Vict. c. 70; for the committee to appoint, and therefore the Court will not appoint in the absence of the committee, *Re Parker*, 32 Beav. 580 (cited Lewin, 768); and *Re Bowmer*, 3 De G. & J. 658; a new trustee in place of a lunatic trustee, whether so found or not, may be appointed under the chancery jurisdiction, *Re Sparrow*, 5 L. R. Ch. 662; see *Re Boyce*, 12 W. R. 359; *Re Vickers*, W. N. (1876) 178.

(2) Where power in instrument insufficient.

(2) For cases where the power given by the instrument did not meet the case which happened, see Lewin, 460–5, *Re Woodgate*, 5 W. R. 448; *Re Harrison*, 22 L. J. Ch. 60 (where the power provided for the case of a trustee being incapable, unwilling, or unable, and the event was that a trustee went abroad); *Cooper* v. *Macdonald*, 14 W. R. 755; *Travis* v. *Illingworth*, 2 Dr. & Sm. 345; *Re Dawson's Trusts*, 3 N. R. 397, where a trustee was unable to sign from ill health; see other cases in the last note.

Where trustees disclaim.

Where the application is in consequence of a trustee refusing to act, the disclaimer may be made at the bar of the Court, *Foster* v. *Dawber*, 1 Dr. & Sm. 172; *Re Barnes*, Seton, 807.

23 & 24 Vict. c. 145.

Many cases where formerly it would have been impracticable to act without the aid of the Court, are now provided for by Lord Cranworth's Act (23 & 24 Vict. c. 145, sects. 27 & 28), which (applying to instruments executed after August 28, 1860, see sect. 34 of the Act), contains large provisions for appointment of new trustees of such instruments in place of trustees, whether appointed by the Court or otherwise.

Whom the Court will appoint.

(*t*) The Court exercises a discretion in appointing new trustees, and as to its general rules and principles in the selection, see *Re Tempest*, 1 L. R. Ch. 485.

Number of trustees.

The Court will under this section, appoint two trustees instead of one (*Re Tunstall*, 4 De G. & Sm. 421; *Plenty* v. *West*, 16 Beav. 356; *Ex parte Wilkinson*, 2 Deac. 151; and *Birch* v. *Cropper*, 2 De G. & Sm. 255; cf. *Re Bathurst*, 2 Sm. & G. 169; *Re Boycott*, 5 W. R. 15, where two new trustees were appointed in addition to two existing trustees, the trust property having greatly increased). Reversioners of a legacy vested in a sole trustee obtained the appointment of a second trustee, *Grant* v. *Grant*, 34 L. J. Ch. 641. But the Court will not, *vice versâ*, appoint one trustee instead of two (*Re Ellison*, 2 Jur. N. S. 62; *Re Porter*, 2 Jur. N. S. 349). But two have been appointed instead of three, when no active duties were left to be performed (*Bulkeley* v. *Earl of Eglinton*, 1 Jur. N.S. 994; *Re Marriott*, W. N. (1868) 125; and when one of three trustees wished to retire and no new trustee was found, the Court appointed the two continuing trustees to act in place of the three, *Re Stokes*, L. R. 13 Eq. 333; and see *Emmett* v. *Clarke*, 9 W. R. 515, 3 Gif. 32, where it was held that three trustees appointed by deed in the place of four, having had the legal estate conveyed to them, could give a valid discharge). As a general rule, the Court will not appoint an only trustee, *Grant* v. *Grant*, 6 N. R. 347; *Re Dickinson*, 1 Jur. N. S. 724; and see *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19; *Re Roberts*, 9 W. R. 758, where it was said that money would never be paid out of Court to an only trustee, unless the estate was substantially represented, nor to a sole executor, *Gouldsmith* v. *Luntley*, W. N. (1875) 97; but, where the trust was about to be shortly wound up, and there had been originally only one trustee, the Court appointed a sole trustee in the place of a lunatic trustee (*Re Reynault*, 16 Jur. 233).

Payment out to sole trustee.

The Court has appointed new trustees of one or more specific trusts

created by an instrument, and not of the entire instrument, *Re Cotterill*, W. N. (1869) 183, but see *Re Garty* and *Re Dennis*, cited in note (*s*), p. 99, *supra*; *Parnell* v. *Hingston*, 3 Sm. & Giff. 377. 13 & 14 Vict. c. 60, s. 32.

. The Court, under this Act, refused to appoint a foreigner residing permanently abroad (*Re Guibert*, 16 Jur. 852; but see *Re Drewe*, W. N. (1876) 168), or a woman, even though unmarried at the time (*Brook* v. *Brook*, 1 Beav. 531), to be a trustee; and see Lewin, 29, 351; *Lake* v. *De Lambert*, 4 Ves. 595. But in *Re Campbell*, 31 Beav. 176, *Re Berkley*, L. R. 9 Ch. 720, an unmarried lady was appointed jointly with another trustee. A *cestui que trust* may, under special circumstances, be appointed (*Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Forster* v. *Abraham*, L. R. 17 Eq. 351), see notes (*e*) and (*f*), p. 92, 3 *ante*. As to appointing a near relative of the parties interested to be a trustee, see *Wilding* v. *Bolder*, 21 Beav. 222; *Re Hattatt*, W. N. (1870) 14. A trustee appointed out of Court may be reappointed by the Court (*Re Mundell*, 2 L. T. N. S. 653, 8 W. R. 683). Trustees resident in a place out of the jurisdiction were appointed where the beneficiary resided in the same place, and the trust property was to be invested in foreign securities, *Re Smith*, W. N. (1872) 134. Where, by inadvertence, an alien had been appointed trustee, the Court refused to discharge the order and appoint a new trustee without the Crown's consent; but on a rehearing, the Crown offering no opposition, a natural-born subject was appointed, *Re Giraud*, 32 Beav. 385, and see now 33 & 34 Vict. c. 14 s. 2. enabling aliens to hold property.

Not foreigner nor female, except as joint trustee. *Cestui que trust.* Near relative. Trustee already appointed. Alien.

The Court requires a written consent by the new trustees to act, unless counsel consent on their behalf (*Re Parke*, 21 L. T. 218; but they need not appear to consent, *Re Draper's Settlement*, 2 W. R. 440). An affidavit of their fitness must be produced (*Re Buttersby's Trusts*, 16 Jur. 900; *Re Tunstall's Will*, 15 Jur. 645, 981). As a general rule, an affidavit of fitness by the solicitor is not enough, *Grundy* v. *Buckeridge*, 22 L. J. Ch. 1007.

Consent of new trustees. Affidavit of fitness.

Where parties interested objected to the trustees proposed to be appointed, and desired the property to be paid in under the Trustee Relief Act, the Court made an order vesting the property in the proposed trustees, on an undertaking by them to transfer it into Court within a month, *Re Dawson*, 3 N. R. 397, and see note (*q*), p. 98, *supra*.

New trustee to pay into Court.

Since the passing of the Trustee Extension Act, sect. 9, the Court can act under this section, when there are no existing trustees, even though the trustees all died in the testator's lifetime, *Re Smirthwaite*, L. R. 11 Eq. 251, but in such a case the heir must be served, *Gunson* v. *Simpson*, L. R. 5 Eq. 332. Trustees were appointed where the testator had appointed executors, but no trustees, *Re Davis*, L. R. 12 Eq. 214; *Dodkin* v. *Brunt*, L. R. 6 Eq. 380.

Where there are no existing trustees.

XXXIII. And be it enacted that the person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by a decree in a suit duly instituted (*u*).

The new trustees to have the powers of trustees appointed by decree in suit.

(*u*) See s. 15 of Lord St. Leonards' Act (22 & 23 Vict. c. 39), *post*, and s. 27 of Lord Cranworth's Act, 23 & 24 Vict. c. 145, which provides that every trustee *appointed by the Court of Chancery either before or after the passing of this Act*, shall have the same powers, authorities, and discretions, and shall in all respects act as if he had been *originally nominated* a trustee by the deed, will, or other instrument creating the trust; see (before that Act) *Bartley* v. *Bartley*, 3 Drew, 384; *Byam* v. *Byam*, 19 Beav. 66, where the Master of the Rolls held that a discretionary consent to be given by *the undersigned trustees* was annexed to the office, and could be exercised by trustees appointed by the Court, *Oglander* v. *Oglander*, 2 De G. & Sm. 381, where it was held that trustees appointed by the Court had not the

Powers of trustees appointed by the Court. 23 & 24 Vict. c. 145, s. 27.

13 & 14 Vict. c. 60, s. 33.

power of appointing new trustees in their own place, *Newman* v. *Warner*, 1 Sim. N. S. 457.

Power of Court to vest lands in new trustees.

XXXIV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees (*v*) either by the same or by any subsequent order to direct that any lands (*w*) subject to the trust shall vest* in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the Court shall direct (*x*); and such order shall have the same effect as if the person or persons (who before such order were the trustee or trustees, if any) had duly executed all proper conveyance and assignments of such lands for such estates.

* See note (*p*) p. 81, *ante*.

Vesting lands under decree.

(*v*) A vesting order was made under this section, where trustees previously appointed by the parties were reappointed by the Court, *Re Clay*, W. N. (1873) 129; but as to the effect of such a vesting order see note (*p*), p. 81, *ante*.

Where a mortgagee's executors had, by decree, been ordered to transfer the mortgage debt to the trustees of a settlement, it was held that this was an appointment of new trustees by the Court, and that a vesting order of the mortgaged property might be made under this section, *Re Hughes*, 2 H. & M. 695.

(*w*) Under this section "lands" include leaseholds, see note (*b*) p. 79.

Whether a declining trustee must execute deed of disclaimer.

(*x*) Before the Court will under this section make an order devesting the estate out of a trustee declining to act, it seems to have been thought by V.-C. Wood that the trustee so declining must execute a deed of disclaimer; as an executor, even though he may not have proved the will, must finally renounce before an order will be made to vest an estate in his co-executor (*Re Badcock*, 2 W. R. 386); a parol disclaimer, on the hearing of the petition, not being sufficient (*Re Ellison*, 2 Jur. N. S. 62). But this *dictum* has been doubted by other judges (see *Foster* v. *Dawber*, 1 Dr. & Sm. 172).

Form of order.

For a form of vesting order under this section, see Seton, 804; *Hancox* v. *Spittle*, 3 Sm. & G. 478; *Re Ellis*, 24 Beav. 426, where the Court directed the circumstances bringing the case within the Act to be inserted in the order. See, too, *Re Mainwaring*, 26 Beav. 172, from which it seems that where the Bank is required to transfer stock, this should always be done.

Vesting in new and old trustees as joint tenants.

The Court may make an order vesting the estate which is outstanding in the old and continuing trustees in the new and continuing trustees as joint tenants (see note to sect. 10), and for the cases on the form, &c. of vesting orders under the Act, see note (*p*), p. 81, *ante*.

Power to Court to vest right to sue at law in new trustees.

XXXV. And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof (*y*), or to sue for

or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees. 13 & 14 Vict. c. 60, s. 35.

(*y*) See note (*p*), p. 81, *ante*, on Vesting Orders of Personalty.

XXXVI. And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done (*z*). Old trustees not to be discharged from liability.

(*z*) See note (*s*), p. 99, *ante*.

XXXVII. And be it enacted, that an order under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage (*a*). Who may apply.

(*a*) On an application for an appointment of new trustees, all the *cestuis que trusts* should be co-petitioners (infants, or lunatics petitioning by their next friends, *Re Fellows*, 2 Jur. N. S. 62; *Re Bourke*, 2 D. J. S. 426), or be served; but if they are very numerous some may petition for the class, *Jones* v. *James*, 9 Hare, Appendix lxxx. Compare Ord. XIV. r. 9, and notes (pt. II. *post*). Who should petition for new trustees.

Any person having a contingent interest in real estate may apply for a new trustee, *Re Sheppard*, 11 W. R. 60, overruling s. c. 10 W. R. 704. Compare *Ross* v. *Ross*, 12 Beav. 89; *Allan* v. *Allan*, 15 Ves. 130; *Davies* v. *Angell*, 31 L. J. Ch. 613. Person *contingently interested*.

The committee of a lunatic should petition where lands are vested in a lunatic trustee (*Re Wheeler*, 1 D. M. G. 434; and see note to p. 436 of the report). Committee of lunatic.

On an application for a vesting order in pursuance of a decree, the person in whom lands are to be vested (*e.g.*, in case of lands sold under a decree, a purchaser who has paid the purchase-money into Court) is a proper person Who should petition for vesting order

13 & 14 Vict. c. 60, s. 37. in pursuance of decree.

to apply as being beneficially interested, *Ayles* v. *Cox*, 17 Beav. 485; and see *Rowley* v. *Adams*, 14 Beav. 130 (in the latter case one petition by the purchasers of several lots was held not multifarious). Creditors who had obtained an administration decree against the debtor's estate were allowed to apply for a vesting order where a sale had been ordered, in *Re Wragg*, 1 D. J. S. 356.

[The 38th section of this Act provided that application might be made before the Master in the first instance, and the Master might give a certificate of the material facts, and of his opinion that the applicant was entitled to the order; and by sect. 39, the applicant having obtained such certificate, might petition the Court or the Lord Chancellor; but since the abolition of the Master's office by 15 & 16 Vict. c. 80 (see p. 121, *post*), applications under the Act are made by petition in the first instance, sect. 40, *infra*].

Power to present petition in the first instance.

* Now the Chancery Division (Judicature Act, 1873, s. 34 (2)).

XL. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery,* or from the Lord Chancellor, intrusted as aforesaid, may, should he so think fit, present a petition (*b*) in the first instance to the Court of Chancery,* or the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence (*c*) by affidavit or otherwise in support of such petition before the said Court, or the Lord Chancellor, intrusted as aforesaid, and may serve (*d*) such person or persons with notice of such petition as he may deem entitled to service thereof.

Application by summons or motion.

(*b*) See *supra*, note (*a*). A vesting order in pursuance of a decree for sale must be applied for in chambers, Cons. Ord. XXXV. 1, r. 4, p. 137, *post*. And as to where an order is made in a cause, see note to sect. 43, *infra*. Applications for new trustees, &c., of charities are generally made in chambers, note (*r*), p. 98, *ante*.

Evidence.

(*c*) In *Re Pickance's Trust*, 10 Hare, App. xxxv., the Court allowed affidavits filed in a cause to be used as evidence on a petition, in the matter of the Acts; and as to evidence in support of a petition under this Act, see *Re Hoskins*, 4 De G. & J. 436, where on a petition for appointing new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes, without the production of baptismal and other certificates.

Service on cestuis que trusts and trustees.

(*d*) The general rule is that all the *cestuis que trusts* should be served, including infants (see *Re Fellows*, 2 Jur. N. S. 62). In cases of retiring trustees, the old trustees also (*Re Sloper*, 18 Beav. 596) should be served; see *Ex parte Hardman*, 3 Mont. Dea. & De G. 559, where the *cestuis que trusts* were abroad; and *Re Richards*, 5 De G. & Sm. 636.

Exceptions.

(1) trustees with a power of sale represent cestuis que trusts.

(2) infants.

But service on all the *cestuis que trusts*, where they are very numerous, may be dispensed with (*Re Sharpley*, 1 W. R. 271; *Re Smyth*, 2 De G. & Sm. 781), and trustees with a power of sale sufficiently represent their *cestuis que trusts*, *Re Blanchard*, 3 D. F. J. 131.

Service upon infant respondents was dispensed with in *Re Tweedy*, 9 W. R. 398; *Re Willan*, *ibid*, 689; *Re Wise*, 5 De G. & Sm. 415; *Re Little*, 7 L. R. Eq. 323.

A trustee *refusing* to transfer need not be served with a petition under the 23rd and 24th sects., see note (*b*), p. 92, *ante*.

13 & 14 Vict. c. 60, s. 40.

The Court will not make a vesting order on petition of a lessee or tenant for life without service on the remaindermen, *Re Farrant*, 20 L. J. Ch. 532 ; *Re Maynard*, 16 Jur. 1084 ; *Re Prescott*, 19 L. T. 375 ; but see *Re Pryse*, L. R. 10 Eq. 531. Where the lease contained no clause prohibiting assignment, an order vesting leaseholds was made in the absence of the lessor (*Re Matthews*, 2 W. R. 85). A petition as to lands vested in a lunatic trustee must be served upon the committee, *Re Saumarez*, 8 D. M. G. 390 ; *Re Wylde*, 5 D. M. G. 25 ; see *Re Wood*, 3 D. F. J. 125 ; *Re Parker*, 32 Beav. 580 ; *Re East*, L. R. 8 Ch. 735 ; as to service of a petition to appoint new trustees in the place of a bankrupt upon the trustee, see *Ex parte Carden*, 12 Jur. 391 ; and on the bankrupt himself, see *Ex parte Whitby*, 1 Dea. 478 ; *Ex parte Harris*, 11 L. J. Bankruptcy, 16. An order to vest lands subject to an annuity may be made in the absence of the annuitant (*Re Winteringham's Trusts*, 3 W. R. 578), see *Ex parte Marshall*, 3 De G. & Sm. 670.

Service of petition by tenant for life ; by lunatic, by bankrupt, on incumbrancers.

See further as to services, the note on costs, note (*l*) to sect. 51, *infra*, p. 109.

What may be done upon petition.

XLI. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said Court or for the said Lord Chancellor, should it be deemed necessary to direct a reference to one of the Masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court or for the said Lord Chancellor to direct such motion or petition to stand over to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court or before the said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

Court may dismiss petition, with or without costs.

XLII. And be it enacted, that upon the hearing of any such motion or petition, whether any certificate or report from a Master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

Power to make an order in a cause.

XLIII. And be it enacted, that whensoever, in any cause or matter, either by the evidence adduced therein, or by the admission of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Act (*e*).

13 & 14 Vict. c. 60, s. 43.

(*e*) See note (*n*) to sect. 30, *ante*, p. 96. Generally an order may be made in a cause without a petition, *Wood* v. *Beetlestone*, 1 K. & J. 213 ; *Viscountess D'Adhemar* v. *Bertrand*, 35 Beav. 19 ; but where the trustee is a lunatic, a petition in lunacy is requisite (see notes (*l*) and (*o*) to sect. 3, p. 80), *Jeffryes* v. *Drysdale*, 9 W. R. 428 ; *Re Dawson*, 6 N. R. 346.

Orders under Act made in cause. (1) Without special application ; (2) on motion.

Vesting orders in a suit were made on motion in *Mackenzie* v. *Mackenzie*, Seton, 810, 812, where a previous order appointing new trustees had been made in a cause ; and see *Re Holbrook's Will*, 8 W. R. 3, where such order had been made on petition in a *matter*, and a subsequent vesting order was made on motion (see too, *Skynner* v. *Pelichet*, 9 W. R. 191).

The petition, though presented in a suit, should be entitled in the Act, *Gough* v. *Bage*, W. N. (1871) 237.

Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

XLIV. And be it enacted, that whenever any order shall be made under this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence (*f*) of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

Order to be conclusive evidence off acts on which it was founded. Trustees of charities.

(*f*) See *Collinson* v. *Collinson*, 3 D. M. G. 409, 414.

13 & 14 Vict. c. 60, s. 45.

Trustees of charities.

XLV. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock, or chose in action in the trustee or trustees of any charity (*g*) or society, over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorising the said Court to make an order to that effect in a summary way upon petition.

(*g*) New trustees of a charity having been appointed under the 16 & 17 Vict. c. 137, s. 28, a vesting order under this section was made in chambers, *Re Davenport's Charity*, 4 D. M. G. 839.

Vesting order on appointment of new charity trustees.

No escheat of property held upon trust or mortgage.

XLVI. And be it enacted, that no lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place (*h*).

(*h*) See 4 & 5 Will. 4, c. 23, s. 3.

Rights of Crown to escheat.

Where an illegitimate mortgagee in fee devised her real and personal estate to a trustee upon certain trusts and died without issue, the Court, the Crown offering no opposition, vested the legal estate in a purchaser, the mortgage-money having been paid off (*Re Minchin*, 2 W. R. 179). From a case of *Bartlett* v. *Bartlett*, however (cited in Ince's Trustee Acts, 2nd ed. p. 91), it would seem that where an illegitimate testator devises estates to which he is beneficially entitled to a trustee who predeceases him and dies without issue, a vesting order cannot be made so as to defeat the rights of the Crown.

Trustee felons.

By sect. 8 of the Extension Act, p. 116, *post*, the Court has power to appoint new trustees in lieu of persons convicted of felony.

Act not to prevent escheat or

XLVII. And be it enacted, that nothing contained in this Act shall prevent the escheat or forfeiture of any

13 & 14 Vict. c. 60, s. 47.

forfeiture of beneficial interest.

lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not passed (*i*).

(*i*) See 4 & 5 Wm. 4, c. 23, s. 5.

Money of infants and persons of unsound mind to be paid into Court.

XLVIII. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the Accountant-General, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a decree in the absence of a trustee.

XLIX. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery, it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee

had been duly served with the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause (*k*): Provided always, that no such decree shall bind, affect, or in any wise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee as aforesaid. 13 & 14 Vict. c. 60, s. 49.

(*k*) The Court under this section ordered a cause to be certified as fit for hearing though a defendant trustee could not be found, and had not appeared (*Westhead* v. *Sale*, 6 W. R. 52).

[Sect. 50 relates to the practice under the obsolete sections, 38, 39.]

LI. And be it enacted, that the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper (*l*). Cost may be paid out of the estate.

(*l*) When a bill was filed for the appointment of a new trustee in a case where a petition might have been presented, the plaintiff was held to be liable for the additional costs, *Thomas* v. *Walker*, 18 Beav. 521. Costs of cause instituted unnecessarily.

The costs of applications in the matter of a trust, whether occasioned by the lunacy (*Re Fulham*, 15 Jur. 69), infancy (*Ex parte Cant*, 10 Ves. 554), or bankruptcy (*Ex parte Painter*, 2 Deac. & Ch. 584), of a trustee, must be borne by the *cestui que trust* or the trust estate, according as the application is for the benefit of the applicant solely, or generally for the benefit of the estate, see *Carter* v. *Sebright*, 26 Beav. 374; *Re Brackenbury*, L. R. 10 Eq. 45. In *Ex parte Davies*, 16 Jur. 882, V.-C. Parker, upon appointing a new trustee and making a vesting order under the Act, by consent ordered the new trustee to pay the costs of the proceedings, and directed that such costs, with interest thereon at 4*l.* per cent., should form a charge on the inheritance, and see *Re Crabtree*, 14 W. R. 497, where costs were directed to be raised by mortgage to be settled by the Court. Compare sect. 29 of the Settled Estates Act, *post*. Where new trustees of two funds were appointed, the costs were borne rateably, *Re Grant*, 2 J. & H. 764. Costs of *applications*. Charged on trust property if for benefit of trust property.

When a trustee is served and appears on an application for appointment of a new trustee, he will, except in case of misconduct (see *Ex parte Harris*, 11 L. J. Bankruptcy 16), be allowed his costs, see *Turner* v. *Molineux*, 3 L. T. N. S. 687, where costs as between solicitor and client were given to a Costs of *appearance* of bankrupt trustee;

13 & 14 Vict. c. 60, s. 51.

bankrupt trustee. For cases where it was held that infant respondents need not be served, see p. 104.

Costs of *vesting order*— (1) As between vendor's estate and purchaser; (2) as between mortgagee's estate and mortgagor redeeming.

The costs of an application for a vesting order as between vendor and purchaser, occasioned by the vendor leaving an infant heir or devisee, must be borne by the vendor's estate, *Heard* v. *Cuthbert*, 2 Ir. Ch. Rep. 369; *Bradley* v. *Munton*, 16 Beav. 294; *Ayles* v. *Cox*, 17 Beav. 584, (where the sale was under a decree), and compare *Re South Wales Ry. Company*, 14 Beav. 418, and cases cited on sect. 82 of the Lands Clauses Act, note (*q*), p. 57, *ante*.

Where mortgagee lunatic.

The costs of an application for a vesting order as between a mortgagor paying off the mortgagee debt and the mortgage, occasioned by the mortgagee leaving an heir who cannot be found, or is lunatic, or a bare trustee who is lunatic, *Re Lewis*, 1 M. & G. 435, are payable by the mortgagor, *Re Marrow*, Cr. & Ph. 142; *Ex parte Ommaney*, 10 Sim. 298; *King* v. *Smith*, 6 Hare, 473; *Re Jones*, 2 D. F. J. 554; *Re Stuart*, 4 De G. & J. 317; Seton, 381; Fisher, 965; but if the application was occasioned by the mortgagee himself becoming lunatic, it should be made by the committee of the lunatic's estate, and the committee will pay the costs out of the lunatic's estate, *Re Rowley*, 1 N. R. 251; *Re Viall*, 8 D. M. G. 439; *Re Wheeler*, 1 D. M. G. 435; *Ex parte Richards*, 1 J. & W. 264; *Re Townsend*, 2 Ph. 348; *Re Thomas*, 22 L. J. Ch. 858; *Re Jones*, L. R. 2 C. D. 70. The mortgagor, if he appears, will not get his costs, *Re Phillips*, L. R. 4 Ch. 629. If, however, the lunatic mortgagee appears on the face of the mortgage-deed to be only a trustee, the trust estate pays the costs, *Re Jones*, 34 L. T. N. S. 470; see *Re Lewes*, 1 M. & G. 23; *Re Townsend*, *ibid.* 686. And if the mortgagor makes the application in a case where the committee of the lunatic has not declined to act, he must bear the costs, *Re Wheeler*, 1 D. M. G. 435.

Costs of respondent trustees in case of *misconduct*.

It was held in *Re Primrose*, 23 Beav. 590, that the Court has no jurisdiction under the Act to order a respondent to pay the costs of a vesting order occasioned by his own misconduct, but see the remarks on that case, *In re Woodburn*, 1 De G. & J. 351. The costs of appointing new trustees were ordered *in a suit* to be paid by trustees who improperly refused to retire, and see *Legg* v. *Mackrell*, 2 D. F. J. 551; *Attorney-General* v. *Murdoch*, 2 K. & J. 571; *Grierson* v. *Astle*, 3 L. T. N. S. 288; *King* v. *King*, 1 De G. & J. 663; *Palairet* v. *Carew*, 32 Beav. 564; *Re Wiseman*, 18 W. R. 574. In *Richardson* v. *Grubb*, 16 W. R. 176 (Ireland), it was decided that failing health, where the trusts were of a formal character only, was not a sufficient reason for a petition asking that they might be discharged, and the petitioner was disallowed his costs. Where a trustee on a petition to appoint new trustees disclaims at the bar he will only be allowed costs as between party and party (*Bulkeley* v. *Earl of Eglinton*, 1 Jur. N. S. 994; and see *Norway* v. *Norway*, 2 M. & K. 278, overruling *Sherratt* v. *Bentley*, 1 R. & M. 655; and *Legg* v. *Mackrell*, *ante*).

Costs in chambers.

As to the costs incidental to an inquiry in chambers, see note to 15 & 16 Vict. c. 80, s. 27, p. 125, *post*.

Commission concerning person of unsound mind.

LII. And be it enacted, that upon any petition being presented under this Act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such persons, and postpone making any order upon such petition until a return shall have been made to such commission (*m*).

(*m*) See notes to sect. 3, and note (*s*), p. 100, *ante*.

13 & 14 Vict. c. 60, s. 53.

Suit may be directed.

LIII. And be it enacted, that upon any petition under this Act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose (*n*).

(*n*) See note to sect. 30, p. 96, *ante*.

Cases where suit directed.

Powers of Court of Chancery to extend to property in the colonies.

LIV. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland) (*o*).

(*o*) Under this section a vesting order was made as to lands in Canada (*Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. N. S. 336). As to lands in Ireland, see *Re Davies*, 3 Mac. & G. 278, where the Lord Chancellor held that an order could not be made to vest such estates in a trustee appointed in the place of a lunatic trustee (see *post*, ss. 55, 56, 57). But when the *cestui que trust* was in England, and the surviving trustee in Ireland, V.-C. Kindersley made an order vesting lands situate in Ireland in a new trustee appointed by the Court (*Re Hewitt's Estate*, 6 W. R. 537).

Lands in — Canada. Ireland.

Powers given to Court of Chancery may be exercised by that Court in Ireland.

LV. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

Powers of Lord Chancellor in Lunacy to extend to property in the colonies.

LVI. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations, and colonies belonging to Her Majesty (except Scotland and Ireland).

Powers of Lord Chancellor in Lunacy may be exercised by Lord Chancellor of Ireland.

LVII. And be it enacted, that the powers and authorities given by this Act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

13 & 14 Vict. c. 60, s. 58.

Short title.

LVIII. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression the "The Trustee Act, 1850."

Commencement of Act.

LIX. And be it enacted, that this Act shall come into operation on the first day of November, one thousand eight hundred and fifty (*p*).

Appeals from orders under the Act.

(*p*) No right of appeal is given by this statute, and it seems doubtful whether (as such right of appeal is expressly given by sect. 2 of the Trustee Relief Act, and by Sir G. Turner's Act, 13 & 14 Vict. c. 35, s. 33, and other acts conferring summary remedies) such an appeal will lie, see *Re Horsley*, W. N. 1869, 106.

See, however, *Re Teynham*, 11 Price, 667, where the House of Lords heard an appeal from an order made on a petition as to guardianship.

TRUSTEE EXTENSION ACT, 1852.

15 & 16 VICT. CAP. 55.

An Act to extend the provisions of the "Trustee Act, 1850." [30*th June*, 1852.

15 & 16 Vict. c. 55.

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

Court of Chancery may make an order for vesting the estate, in lieu of conveyance by a party to the suit after a decree or order for sale.

I. That when any decree or order (*a*) shall have been made by any Court of Equity directing the sale of any lands for any purpose whatever (*b*), every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said Court shall think it expedient for the purpose of carrying such sale

into effect, to make an order vesting such lands or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate. 15 & 16 Vict. c. 55, s. 1.

(*a*) This section applies retrospectively to a decree made before the passing of the Act, *Wake* v. *Wake*, 17 Jur. 545. Section retrospective.

(*b*) See the 29th section of the "Trustee Act, 1850," which only applied to a sale for payment of *debts*. 29th section of Trustee Act, 1850.

II. That sections numbered 17 and 18 in the Queen's Printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorised agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order (*c*) vesting such lands in such person in such manner and for such estate as the Court shall direct; or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (*d*). Power to make an order for vesting the estate, on refusal or neglect of a trustee to convey or release.

(*c*) See sect. 23 of the Act of 1850, p. 91, *ante*, and notes. The refusing trustee need not be served, *Re Crowe*, L. R. 13 Eq. 26. Trustee need not be served.

(*d*) For orders under this section, see *Re O'Donnell*, 19 W. R. 522; *Knight* v. *Knight*, 14 L. T. N. S. 161. Vesting orders.

This section was acted on where a mortgagor of copyholds by covenant to surrender neglected to do so, *Re Crowe*, L. R. 13 Eq. 26. Mortgagor of copyholds refusing to surrender.

As to the mode in which the person appointed to convey is to execute the necessary instruments, see *Ex parte Foley*, 8 Sim. 395.

15 & 16 Vict. c. 55, s. 3.

Power to make an order for the transfer or receipt of dividends of stock in name of an infant trustee.

* See note (*p*), p. 81.

III. That when any infant shall be solely entitled to any stock (*e*) upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons (*f*) the right to transfer such stock, or to receive the dividends or income thereof (*g*); and when any infant shall be entitled jointly with any person or persons to any stock upon any trust, it shall be lawful for the said Court to make an order vesting* the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint.

Infant trustee of stock.

(*e*) The former Act contained no provision for the case of an infant trustee of stock, see note to sect. 8 of the principal Act, and *Cramer* v. *Cramer*, 16 Jur. 331; *Devoy* v. *Devoy*, 3 Sm. & G. 403.

Infant beneficially entitled.

(*f*) In *Re Morgan*, Seton, 825, the right was vested in the infant's guardian. See, too, *Re Thornton*, 9 W. R. 475, cited p. 98. Where an infant was beneficially entitled to stock standing in his own name, an order declaring him trustee of such stock, and directing a transfer under this section, was held informal, and an order was substituted under 11 Geo. 4 & 1 Will. 4, c. 65, s. 32, by which, where an infant is beneficially entitled to stock, it may be paid to his guardian, *Re Pongerard*, 1 De G. & Sm. 426; *Re Westwood*, 6 N. R. 61, 316. See, however, *Sanders* v. *Homer*, 6 W. R. 476; *Gardner* v. *Cowles*, 24 W. R. 920, W. N. (1876) 234.

(*g*) See note at foot of p. 81, *ante*.

On neglect to transfer stock for 28 days order may be made vesting right to transfer in such person as the Court shall appoint.

IV. That where any person shall neglect or refuse to transfer any stock (*h*), or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him (*i*) it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

Vesting order of stock.

Order may be made on motion.

(*h*) See sect. 23 of the former Act, p. 91, *ante*.

The order under this section, may, it seems, be made on *motion*, *Re Holbrook's Will*, 8 W. R. 3; *Skynner* v. *Pelichet*, 9 W. R. 191.

(*i*) The service should be personal, unless the order can be made under section 23 of the principal Act, *Coles* v. *Benbow*, W. N. (1873) 60.

On like neglect by exe-

V. When any stock shall be standing in the sole name

of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

15 & 16 Vict. c. 55, s. 5.

cutor, similar order may be made.

VI. When any order being or purporting to be under this Act or under the Trustee Act, 1850, shall be made by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly (*k*); and the person or persons so appointed shall be authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Bank of England and companies to comply with orders. (See ss. 20 & 26 of Trustee Act, 1850.)

(*k*) This enactment was rendered necessary by *Re Smyth's Settlement*, 4 De G. & Sm. 499, which decided that the former Act only gave the right to call for a transfer of the stock. See note at foot of p. 81, *ante*.

Re Smyth's settlement.

VII. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor, instrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England,

Indemnity to Bank and companies so obeying.

15 & 16 Vict. c. 55, s. 7.

and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association, or person to inquire concerning the propriety of such order, or whether the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery had jurisdiction to make the same.

Power to appoint new trustees in lieu of persons convicted of felony.

VIII. That when any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same (*l*).

(*l*) See note (*h*), *ante*, p. 107, as to escheat of trust property.

Power to the Court to appoint new trustees where there is no existing trustee.

IX. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable (*m*) so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order (*n*).

Where no existing trustee.

(*m*) See notes, *ante*, p. 100.

(*n*) See foot of note (*t*) to the 32nd section of the "Trustee Act, 1850," p. 101, *ante*, as to the necessity for this provision.

Chancellor may make order for appointment of trustees, without it being necessary that it should be

X. In every case in which the Lord Chancellor, intrusted as aforesaid, has jurisdiction under this Act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees in like manner as the Court of Chancery may

do in like cases, without its being necessary that the order should be made in Chancery as well as in lunacy, or be passed and entered by the Registrar of the Court of Chancery (*o*). 15 & 16 Vict. c. 55, s. 10. made in Chancery, &c.

(*o*) See *Re Waugh's Trust*, 2 D. M. G. 279; and note (*o*) to the 3rd section of the former Act, *ante*, p. 80. Jurisdiction in lunacy.

XI. That all the jurisdiction conferred by this Act, on the Lord Chancellor, intrusted by virtue of the Queen's Sign Manual with the care of the persons and estates of lunatics, shall and may be had, exercised, and performed by the person or persons for the time being intrusted as aforesaid (*p*). As to powers of persons intrusted with the care of lunatics.

(*p*) See the Judicature Act, 1875 (38 & 39 Vict. c. 77), sect. 7, *post*.

XII. That this Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with this Act) shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850. Act to be construed as part of Trustee Act, 1850.

XIII. That every order to be made under the Trustee Act, 1850, or this Act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty (*q*). All orders made under Trustee Act, 1850, or this Act to be chargeable with the same stamp duty as deeds of conveyance.

(*q*) By 24 & 25 Vict. c. 91, s. 30, where several deeds are necessary for the appointment of new trustees, only one is to be liable to full duty, and the others are to be stamped as counterparts.

AN ACT TO DIMINISH DELAY IN CHANCERY.

[*Commonly called "Sir G. Turner's Act."*]

13 & 14 VICT. CAP. 35.

An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery in England.

[15*th July*, 1850.

13 & 14 Vict. c. 35, s. 1.

Power to persons interested in questions cognizable in Court of Chancery to state *original* special cases for the opinion of the Court.

WHEREAS proceedings in the High Court of Chancery in England are attended with great delay and expense, which it is expedient to diminish: Be it therefore enacted, &c., that it shall be lawful for persons interested or claiming to be interested in any question cognizable in the said Court as to the construction of any Act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter, or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with, or as to the parties to or the form of any deed or instrument for carrying any such contract into effect, or as to any other matter falling within the original jurisdiction of the said Court as a Court of Equity, or made subject to the jurisdiction or authority of the said Court by any statute not being one of the statutes relating to bankrupts, and including among such persons all lunatics,* married woman, and infants, in the manner and under the restrictions hereinafter contained, to concur in stating such questions in the form of a special case for the opinion of the said Court, and it shall also be lawful for all executors, administrators, and trustees to concur in such case.

* See s. 34.

Ss. 2—18. Practice as to special cases.

[Sections 2—18 contain the practice as to special cases under this Act, which seems to be superseded though not made obsolete by that under Ord. XXXIV. (pt. II., *post*), by which special cases may be filed after writ issued. See the notes to that Order, where the effect of ss. 2—18 of this Act is given for purposes of comparing the procedure by *original* special cases under this Act, with that under the Order.

[Sections 19 to 25 provided that the Court might on the application of executors or administrators direct a reference to take the accounts of personal estate; and these sections (as extended by 23 & 24 Vict. c. 38, s. 14, *post*), enabled an executor to *initiate* proceedings (respecting *personal estate* only, *Re Moore*, 2 W. R. 85), which he could not do under 15 & 16 Vict. c. 86, ss. 45, 46; but by 22 & 23 Vict. c. 35, ss. 27—32, and 23 & 24 Vict. c. 38, s. 3, an executor or administrator can get complete protection, *Clegg* v. *Rowland*, 3 L. R. Eq. 368; and these sections are practically disused.]

13 & 14 Vict. c. 35, ss. 19 to 25.

Statutory remedies for and against executors and administrators.

[Section 26 related to applications as to the conduct of suits. Such applications are now made in chambers, see sect. 26 of the Master in Chancery Abolition Act, *post*, p. 124.]

[Sect. 26.]

[By section 27 exceptions for scandal, impertinence, and insufficiency were to be heard by the Court. See now as to scandal, Ord. XXVII. r. 1.

Exceptions for impertinence were abolished (15 & 16 Vict. c. 86, s. 17), and for insufficiency by Cons. Ord. XXXI. 9.]

[Sect. 27.]

XXVIII. And be it enacted, that, notwithstanding any rule or practice of the said Court to the contrary, it shall be lawful for the said Court, at the hearing of any cause or of any further directions therein, to receive proof by affidavit* of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said Court to order payment of any monies belonging to any married woman, and of all such other matters not directly in issue in the cause (*a*) as in the opinion of the said Court may safely and properly be so proved.

Power for Court to receive proof by affidavit.

* See now Ord. XXXVII. r. 1, *post*.

(*a*) Affidavits were admitted at the hearing under this section as evidence that no appointment of trust funds had been made by deceased persons, in support of a suit by a party claiming in default of appointment (*Devey* v. *Thornton*, 9 Hare, 222, 233; and see *Smith* v. *Leathart*, 20 L. J. Ch. 202).

Affidavits when admitted.

So, where a class of children was interested, the Court, instead of directing the preliminary class inquiry, received the affidavits of the parents proving the class, and then allowed the cause to be heard (*Bush* v. *Watkins*, 14 Beav. 33; cf. *Bear* v. *Smith*, 5 De G. & S. 92; *Fowler* v. *Reynell*, 15 Jur. 1019; *Other* v. *Smurthwaite*, L. R. 5 Eq. 437). As to what exhibits and documents can be proved at the hearing under this section, see Daniell, 816. Matters raising a new issue not noticed in the pleadings cannot be proved under this section; thus, where the pleadings in the cause raised the issue as to what fund a legacy should be charged on, and at the hearing on further consideration an affidavit was tendered to prove that the legacy had been paid, it was held that as the affidavit related to an issue not raised by the pleadings it was inadmissible under this section, but a further inquiry was directed (*Howard* v. *Chaffers*, 11 W. R. 585; see *Hoghton* v. *Hoghton*, 15 Beav. 278). So, an affidavit as to the conduct of the plaintiffs could not be received at the hearing after the Master's report had been made (*Bateman* v. *Margerison*, 2 W. R. 607; *Evans* v. *Lewis*, 2 L. T. N. S. 559, where *Fallows* v. *Lord Dillon*, 2 W. R. 507, was not followed).

Affidavits admitted at hearing.

13 & 14 Vict. c. 35, s. 29.

[By s. 29 it is made lawful for the Master of the Rolls and the Vice-Chancellors respectively to discharge, reverse, or alter any order made on motion or petition of course by any other of them, or by the Lord Chancellor.]

Orders of course.

[Ss. 31, 32 gave power to make general rules and orders under the Act. None such were made as to special cases; but an order as to advertisements for creditors was made, see p. 157, *post*.]

[By section 33 all decrees and orders under the Act were to be subject to appeal.]

Meaning of "lunatic guardian."

[S. 34 provided, inter alia, that the word "lunatics" shall include idiots and persons of unsound mind, and whether found such by inquisition or not:

The word "guardian" shall mean father or testamentary guardian, or guardian appointed by the Court of Chancery (not being a special guardian appointed under the provisions of this Act).]

Commencement of Act.

XXXV. And be it enacted, that this Act shall commence and take effect from and after the first day of November one thousand eight hundred and fifty.

MASTER IN CHANCERY ABOLITION ACT, 1852.

15 & 16 VICT. CAP 80.

An Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make provision for the more speedy and efficient Despatch of Business in the said Court. [30*th June*, 1852.

15 & 16 Vict. c. 80.

WHEREAS proceedings before the Masters in Ordinary of the High Court of Chancery are attended with great delay and expense, and it is expedient that the business now disposed of in the office of such Masters should be transacted by and under the more immediate direction and control of the judges of the said Court (*a*): Be it therefore enacted, &c., as follows:

Practice in Chancery chambers.

(*a*) The practice in the Chambers of the Chancery division is not interfered with by the Judicature Acts or Orders, consequently the statute 15 & 16 Vict. c. 80 (except the sections which have become inoperative) and Consolidated Order XXXV. relating to the practice in chambers, p. 137, *infra*, as well as the regulations relating to practice in chambers, p. 165, *infra*, are here given.

[Sections 1-10, relate to the abolition of the Master's Offices, and the winding-up of business pending therein.] 15 & 16 Vict. c. 80, s. 1.

Masters in Chancery abolished.

Master of the Rolls and Vice-Chancellors to sit at chambers.

XI. From and after the first day of Michaelmas term one thousand eight hundred and fifty-two it shall be lawful for the Master of the Rolls and the Vice-Chancellors for the time being and they are hereby required to sit at chambers (*b*) for the despatch of such part of the business of the said Court as can, without detriment to the public advantage arising from the discussion of questions in open Court, be heard in Chambers, according to the directions hereinafter in that behalf specified or referred to; and the times at and during which they respectively shall so sit shall be from time to time fixed by them respectively.

Practice in chambers.

(*b*) For the business to be disposed of at chambers, see sect. 26, *infra*; and as to adjournments from Court into chambers, see sect. 27. Cases of difficulty will be heard in Court, see sects. 27 and 29; and as to the right of parties to see the judge himself, see note (*c*), *infra*.

Accounts and inquiries.

For the practice as to taking in chambers accounts and inquiries directed by a decree or order, see Ord. XXXV., rules 15, *et seq.*, p. 142, *infra*.

Power to Lord Chancellor to provide chambers for the Master of the Rolls and Vice-Chancellors.

XII. The chamber business of the Master of the Rolls and of every Vice-Chancellor shall be carried on in conjunction with his Court business; but as no rooms are attached to the courts of the Vice-Chancellors in which such chamber business can be transacted, it shall be lawful for the Lord Chancellor to cause chambers to be provided for every of them respectively for that purpose until Courts with proper rooms attached can be provided for them.

Judges to have same power and jurisdiction as in open Court.

XIII. The Master of the Rolls and every of the Vice-Chancellors respectively when sitting in chambers shall have the same power and jurisdiction in respect of the business to be brought before them, as if they were respectively sitting in open court (*c*).

Right of party to see judge himself.

(*c*) All orders made in chambers are considered to be made by the judge himself, and, consequently, the judge in chambers is always accessible to any of the parties engaged in proceedings there, who wish to see him, and it is the invariable practice to give any party, suggesting that he wishes to see the judge personally, the opportunity of doing so directly (*Hayward* v. *Hayward*, Kay, App. xxxi.; *Re Rigg*, 10 W. R. 365); and the same rule applies to cases under the Winding-up Acts (*Re Agriculturist Cattle Insurance Company*, 3 D. F. J. 194; *Re Home Counties Life Assurance Company*, 10 W. R. 457.) See *Saunders* v. *Walter*, 9 Hare, App. v., and *Re London and*

15 & 16 Vict. c. 80, s. 13.

County Assurance Company, 5 W. R. 794, where upon a motion to commit a party, who refused to answer a question, and requested that the case might be adjourned for hearing before the judge, it was held, that either party has a right on the minutest point to require an adjournment of the case before the judge himself in chambers, and the motion to commit was refused with costs. See *Williamson* v. *Jeffreys*, 9 Hare, App. lvi. ; *Leeds* v. *Lewis*, 3 Jur. N. S. 1290, and see note (*o*), p. 127, *infra*, as to adjourning the examination of a witness to be taken before the judge in person, and generally as to adjournment into Court, see s. 27, *infra*.

Adjournment into Court.

Further accounts and inquiries

The judge may direct further accounts and inquiries, Cons. Ord. XXXV., r. 19, p. 143, *post*.

Appearance by solicitors.

As to the appearance of parties by solicitors in chambers, see Cons. Ord. XXXV., r. 20, p. 144, *post*.

Orders made in chambers to be ordinarily drawn up by judges' clerks, but judges may direct them to be drawn up by registrars of the Court, and may require their attendance at chambers for the purpose.

XIV. The orders made by the Master of the Rolls and Vice-Chancellors respectively when sitting in chambers shall ordinarily be drawn up there by their respective clerks, to be appointed as hereinafter mentioned, but with power to each of such judges to direct any of such orders to be drawn up by the registrar of the said Court in like manner as orders made by a judge of the said Court in open Court are drawn up, for which purpose the registrars of the said Court shall, when required, attend the Master of the Rolls and the Vice-Chancellors respectively when sitting at chambers, in such order and manner as shall be found most convenient for furthering the business of the said Court, and as the Lord Chancellor, with the concurrence of the Master of the Rolls and Vice Chancellors, or any two of them, shall from time to time by any general order direct (*d*).

(*d*) As to entering the orders, see Cons. Ord. XXXV. r. 32, p. 148, *post*.

Orders made at chambers to have same force as orders of Court, &c.

* See now Judicature Act, 1873, s. 34 (2).

XV. All orders of the Master of the Rolls or of any Vice-Chancellor, made by him at chambers, shall have the force and effect of orders of the Court of Chancery,* (*e*) and such orders may be signed and enrolled (*f*) in like manner.

(*e*) As to drawing up orders in chambers, see Cons. Ord. XXXV. r. 32, *infra*, p. 148.

(*f*) Enrolment of decrees is obsolete, per James, L. J., *Hastie* v. *Hastie*, L. R. 2 Ch. Div. 304.

Enforcement of orders.

[Sections 16—25 related exclusively to the appointments and removal of the chief and junior clerks ; respecting whom a new Act has been passed, viz., 30 & 31 Vict. c. 87, giving the Lord Chancellor power to order additional chief clerks and junior clerks to be appointed, the *total number of chief clerks*, not at any time to exceed *twelve* ; also to appoint additional *registrars* up to *thirteen*.

See now 36 & 37 Vict. c. 66, sect. 84, and Ord. LX. *post*.]

15 & 16 Vict. c. 80, s. 16.

XXVI. The business to be dispossed of by the Master of the Rolls and Vice-Chancellors respectively while sitting at chambers shall consist of such of the following matters as the judge shall from time to time think may be more conveniently disposed of in chambers than in open Court, *videlicet*, applications for time to plead, answer, or demur; for leave to amend bills or claims; for enlarging publication; and also applications for the production of documents; applications relating to the conduct of suits or matters; applications as to the guardianship and maintenance of infants; matters connected with the management of property; and such other matters as each such judge may from time to time see fit, or as may from time to time be directed by any general order of the Lord Chancellor (*g*).

Chief and junior clerks. Court of Chancery (Officers) Act, 1867, 30 & 31 Vict. c. 87. Business to be disposed of in chambers by the judges.

(*g*) See Cons. Ord. XXXV. p. 137, *post*, which provides that applications for

Cons. Ord. XXXV. r. 1. Applications under Trustee Acts, &c.

Payment of interest of funds in Court,

applications under the

Legacy Duty Act,

under the

Trustee Relief Act,

under the

Trustee Acts where a sale has been decreed,

and on behalf of

Infants under the Property Law Amendment Act,

shall be made in chambers.

By a notice issued in pursuance of the section in the text, affixed to the chambers of the Master of the Rolls and the Vice-Chancellors, on the 10th of November, 1852, it was provided that the following applications should be made in chambers (see 9 Hare, App. xlviii.).

1. *As to guardianship of infants.*

Guardianship of infants.

Except the appointment of guardians *ad litem*, as to which see note to Ord. XVI. r. 8 (pt. II. *post*).

Guardians to act on behalf of infants under the Settled Estates Act are to be appointed on summons, see note to 19 & 20 Vict. c. 120, s. 36, *post*. For the evidence to be produced on applications for guardians, see 19th Judges' Regul., Aug. 1857 (p. lv. *post*).

2. *For the appointment of a guardian to concur in a special case.*

But such applications are now made in Court, *Thornhill* v. *Copleston*, 10 Hare, App. lxvii. s. 11.

3. *As to the maintenance or advancement of infants.*

Maintenance and advancement of infants.

See for the necessary evidence, 19th Regul., Aug. 1857, p. 171, *post*.

15 & 16 Vict. c. 80, s. 26.

4. *Under the Drainage Act.*

8 & 9 Vict. c. 56.

Applications under Drainage Act.

5. *Under the Trustee Acts of* 1850 *and* 1852.

Under Trustee Act.

See Cons. Ord. XXXV. 1, p. 137, *post.*

Administration summons.

6. *For the administration of estates under the Act* 15 *&* 16 *Vict. c.* 86.

See 15 & 16 Vict. c. 86, ss. 45—47, *post*, and Cons. Ord. XXXV. r. 6, p. 139, *post.*

Under Legacy Duty Act.

7. *Under the Legacy Duty Act.*

See page 64, *ante*, and Cons. Ord. XXXV. r. 1, p. 137, *post.*

For time.

8. *For time to plead, answer, or demur.*

(But when the time originally given *has expired*, the application is by motion.)

For leave to amend.

9. *For leave to amend bills.*

See now as to amending pleadings, Ord. XXVII. (pt. II. *post*).

10. *For enlarging publication, or the time for closing evidence.*

See now Ord. XXXVII. (pt. II. *post*).

For production of documents.

11. *For the production of documents.*

See Ord. XXXI. r. 12 (pt. II. *post*).

Conduct of suit.

12. *Relating to the conduct of suits or matters.*

See note to Ord. V. r. 4 (pt. II.), on the subject of amalgamation of causes for the same matter.

Management of property.

13. *As to matters connected with management of property.*

Under this head a receiver was appointed in the place of trustees (*Booth* v. *Coulton*, 16 W. R. 684; 18 L. T. N. S 384). See *Turner* v. *Turner*, 30 Beav. 414, as to such applications if a suit is pending.

Payment into Court of purchase money under sales.

14. *For payment into court of purchase-monies under sales by order of the Court, and investing the same.*

By the 15th rule of the amended rules under the Chancery Funds Act, 1872 (*post*)—

Applications under Copyhold Act.

Applications under the Copyholds Acts respecting securities or money in Court

are to be made by summons in chambers; and this rule is to be an additional article to Cons. Ord. XXXV. r. 1, p. 137.

15 & 16 Vict. c. 80, s. 27.

Judges may adjourn from open Court to chambers, and *vice versâ*, the the consideration of any matter.

XXVII. It shall be lawful for the Master of the Rolls and every of the Vice-Chancellors respectively when sitting in open Court to adjourn for consideration in chambers (*h*) any matter which, in the opinion of such judge, may be more conveniently disposed of in chambers, or when sitting in chambers, to direct any matter to be heard in open Court which he may think ought to be so heard (*i*).

Special directions when necessary.

(*h*) It was held that where a plaintiff is to go into fresh evidence in chambers, in support of a point in his case raised at the hearing, (*e.g.*, whether valuable consideration was really given, when the settlement under which he claims is *primâ facie* voluntary), there must be an order drawn up directing the inquiry (*Kelson* v. *Kelson*, 9 Hare, App. lxxxvi. ; and see note (*v*), to Cons. Ord. XXXV. 19 p. 144, *post*).

Cons. Ord. XXXV. 19.

Costs reserved without special direction.

When a cause is adjourned to chambers, the reservation of costs is implied without an express direction to that effect (*Wallis* v. *Bastard*, 2 W. R. 47 ; and see *Leeds* v. *Lewis*, 3 Jur. N. S. 1290) ; so, too, when *vice versâ*, the cause is adjourned into Court (*Dicken* v. *Hamer*, 2 L. T. N. S. 276 ; see *Re Fellows*, 2 Jur. N. S. 62, from which it seems that a petition ought not to ask for the costs "incidental to an inquiry" in chambers generally), and see next page as to costs of proceedings in chambers generally.

Practice on adjournment into chambers.

When a cause is adjourned to chambers, or any directions are given in Court to be acted on in chambers, a registrar's note must be obtained, Judges' Regul., Aug. 8, 1857, r. 3 p. 165, *post*.

(*i*) For the practice as to adjourned summons to take the judge's opinion on any point in the certificate, see *post*, sect. 33 and notes ; and as to adjournment into Court upon application to vary the chief clerk's certificate, see notes to sect. 34, *infra*.

The hearing of the case in Court when adjourned, is only a continuation of the hearing in chambers (*Leeds* v. *Lewis*, 3 Jur. N. S. 1290), the case being generally brought on in Court as a motion by the party who took out the summons in chambers. And see *Jaquet* v. *Jaquet*, 7 W. R. 543, where the Master of the Rolls refused to hear in support of the summons a party who did not join therein.

Discretion of judge.

It is in the discretion of the judge to make a rule that he will hear matters requiring his *personal attention* (see note (*c*), p. 121, *ante*), in court and not in chambers, *Re Agricultural, Cattle Insurance Company*, 3 D. F. J. 194, 11 W. R. 330, 386.

Mode of proceeding before judges at chambers to be by summons as at common law.

XXVIII. The mode of proceeding before the Master of the Rolls and Vice-Chancellors respectively at chambers shall be by summons (*k*), and as near as may be according to the form now adopted by the judges of the superior courts of common law when sitting at chambers (*l*).

Summons.

(*k*) See as to service of summons, Cons. Ord. XXXV. rr. 5—8, p. 138, *post*, and as to appearances of parties summoned, rr. 9—11, p. 139, *post*, and as to adjourned summons and further consideration, see r. 14, p. 141, *post*, and as to the "summons and appointment book," r. 24, *et seq.* p. 146, *post*.

Counsel in chambers.

The Add. Rules (Aug., 1875), VII. 14), *post*, provide that the costs of counsel in attending judge's chambers are not to be allowed, unless the judge certifies it to be a proper case to be argued by counsel, but in the chambers of Jessell, M.R., the attendance of counsel (except on questions of time, when such attendance is disallowed), do not require to be specially allowed, *Webber* v. *Fitzgerald*, W. N. (1875) 244. See, too, *Greville* v. *Greville*, 27

15 & 16 Vict. c. 80, s. 28.

Beav. 308, and *Graham* v. *Graham*, Jo. 624. The practice as to counsel being heard before the judge in chambers varies in different judges' chambers. As laid down by V.-C. Wood, the rule was that, if one side only desired to be heard by counsel, the application was heard in chambers: if both wished to be heard by counsel, it was adjourned into Court (*Rumbold* v. *Forteath*, 3 K. & J. 44, 47). See generally *Harrison* v. *Mayor of Southampton*, 29 L. T. 61; *Ex parte Bunn*, 24 Beav. 137; *Hudson* v. *Carmichael*, 18 Jur. 852; *Re Bennett*, 18 Jur. 33; and see *infra*, under head "where counsel have been heard."

Cons. Ord. XXXV. Procedure in chambers.

(*l*) See for procedure in chancery chambers, Cons. Ord. XXXV. r. 26, p. 147, *post*, by which it is to be the same as in Court upon motions. See also ibid., rr. 27, 28, as to affidavits; and ibid., rr. 29—31, as to witnesses; r. 32, as to orders; r. 33, as to accounts; rr. 35—37, as to advertisements; rr. 38—44, as to claimants coming in; rr. 45—66, as to certificates; r. 57, as to register of proceedings; rr. 58, 59, as to vacations; and Judicature Act, 1873, s. 50, *post*, as to appeals.

Appeals.

Power to the judges to direct what matters, &c., shall be heard and investigated by themselves and what by their chief clerks.

XXIX. From and after the first day of Michaelmas term, one thousand eight hundred and fifty-two, the Master of the Rolls and the Vice-Chancellors respectively shall have the sole power (subject to any rules which may be made by the Lord Chancellor with the advice and assistance of them or any two of them) to order what matters and things shall be investigated by and before their respective chief clerks, either with or without their direction, during their progress, and what matters and things shall be heard and investigated by themselves; and particularly if the judge shall so direct, his chief clerks respectively shall take accounts, and make such inquiries as have usually been prosecuted before the chief clerks of the present Masters; and the judge shall give such aid and directions in every or any such account or inquiry as he may think proper, but subject nevertheless to the right hereinafter provided for the suitor to bring any particular point before the judge himself (*m*).

Right to suitor to bring any point before the judge.

(*m*) As to the right of parties to see the judge personally, see note (*c*) to sect. 13 (p. 121, *ante*).

Power to chief clerks to issue adverments and summonses, to administer oaths, &c., as the judge shall direct.

XXX. Each chief clerk shall, for the purpose of any proceedings directed by the Master of the Rolls or any Vice-Chancellor to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments (*n*) other than acknowledgments by married women, to receive affirmations, and, when so directed by the judge to whose Court he is attached, to examine parties and

witnesses either upon interrogatories or *vivâ voce*, as such judge shall direct (*o*). 15 & 16 Vict. c. 80, s. 30.

(*n*) As to what affidavits may be used in chambers, see Cons. Ord. XXXV. 27, 28, p. 147, *post*, note to Ord. XXXVII. r. 1, *post*; and *Basham* v. *Smith*, 22 Beav. 190. Evidence used in chambers.

(*o*) As to examination of witnesses upon interrogatories, see *Davey* v. *Durrant*, 24 Beav. 411, 2 De G. & J. 506; *Wing* v. *Harvey*, 17 Jur. 481; *Croskey* v. *European, &c., Shipping Company*, 14 W. R. 514; and now Ord. XXXI. r. 1-10, *post*. Examination on interrogatories, or before the chief clerk.

The practice as to examinations before the chief clerk is to be the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case. Cons. Ord. XXXV. 30, 31, p. 148, *post*

It was held that the order of 5th Feb. 1861, only applied to causes where issue was joined, and *before the hearing*, so that the rule as to each party's producing his own witnesses for cross-examination did not apply to proceedings in chambers, *Stebbing* v. *Atlee*, 2 Jur. N. S. 1161; *Jenner* v. *Morris*, 10 W. R. 640. See now Ord. XXXVIII. r. 4, which provides that a party desiring to cross-examine a defendant on an affidavit may serve on the party, by whom such affidavit has been filed, a notice requiring the production of the witness *before the Court at the trial*. This rule does not seem to apply to proceedings in chambers.

If the examination is before an examiner, a subpœna should be issued. See Cons. Ord. XXXV. r. 29, p. 147, *post*; and see *Venables* v. *Schweitzer*, L. R. 16 Eq. 76, as to the power of the chief clerk to make witnesses attend to answer questions put to them by the person having the conduct of the decrees, and as to the privilege of such witnesses. Before examiner.

See further as to the mode of examination before the chief clerk, *Rogers* v. *Mort*, 10 Hare, Ap. liii. (from which it seems that he need not take down the depositions in his own handwriting), *Re London, Birmingham, and Bucks Railway Company*, 6 W. R. 141. Depositions.

As to the power to examine witnesses in chambers in winding-up cases since the Company's Act, 1862, see *Re English Joint Stock Bank*, 3 L. R. Eq. 203, 207. Under Company's Act, 1862.

When an *accounting party* brings in his accounts in chambers, the other side may examine him *vivâ voce*, and the accounting party may be ordered to produce documents, Cons. Ord. XXXV. r. 34, p. 148, *post*; but notice must be given of the points on which they wish to examine him, *Wormsley* v. *Sturt*, 22 Beav. 398; *Re Lord*, 2 L. R. Eq. 605. Examination of accounting party.

If a party examined in chambers refuse to give a sufficient answer, the judge should be asked to examine him personally, and if he then refuse to answer he may be committed at once, *Hayward* v. *Hayward*, Kay, App. xxxi. It was held that if the examination was by interrogatories, the first step should be to except to the answer, *Croskey* v. *European, &c., Shipping Company*, 14 W. R. 514. But now by Ord. XXXI. 9, exceptions are abolished and a summary process substituted. Practice when party examined in chambers refuses to answer.

A witness has a right, if he wishes, to require that his examination should be conducted before the judge and in person (*Re London and County Assurance Company*, 5 W. R. 794, and see note (*c*), p. 121, *ante*; and cf. *Hayward* v. *Hayward*, l. c.; *Re Home Counties Life Assurance Company*, 10 W. R. 457; *Re Agriculturist Cattle Insurance Society*, 3 D. F. J. 194; *Ex parte Bunn*, 24 Beav. 137, where on a witness refusing to be sworn before the chief clerk, on the ground that he required the assistance of counsel, it was held, on a motion to commit the witness, that the proper course was, after he was sworn, to apply that his examination might be taken before the judge, or an examiner, or, if necessary, that the case might be adjourned into Court). See, too, *Re the Esgair Mwyn Mining Company*, 8 W. R. 669, where it was held, that, although the chief clerk had power in a winding-up case to summon a witness before him until the list of contributories was definitely settled, yet a motion to commit such witness for refusing to attend could Examination before judge in person.

15 & 16 Vict. c. 80, s. 30.

not be entertained until such refusal had been certified by the judge in chambers under the 11 & 12 Vict. c. 45.

Examination first in Court and again in chambers.

In one case, witnesses, who had been examined before the hearing, upon interrogatories, were examined again *viva voce*, before the chief clerk, as to the same matters (*Rogers* v. *Mort*, 10 Hare, App. liii. cf. *Hextall* v. *Cheadle*, 1 Sm. & G. 78; *Routh* v. *Tomlinson*, 16 Beav. 251).

Transfer of examination.

No special order is required for the transfer of a witness's examination from chambers to the examiner's office (*Stebbing* v. *Atlee*, 26 L. J. Ch. 265).

Process of contempt.

XXXI. Parties and witnesses so summoned shall be bound to attend in pursuance of any such summons; and shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of the said Court,* or in case of default in attendance, in pursuance of any order of the said Court, or of any writ of subpœna ad testificandum (*p*); and all persons swearing or affirming before any such chief clerk shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing or affirming contained therein as if the matters sworn or affirmed had been sworn and affirmed before any person now by law authorised to administer oaths, to take affidavits, and to receive affirmations.

* The Chancery division of the High Court of Justice (Judicature Act, 1873, s. 34 (2)).

Prisoner how brought to chambers.

(*p*) See notes to preceding section. A writ of *habeas corpus* may be issued to bring up a prisoner under a common law process, whose attendance is required in chambers (*Buckeridge* v. *Whalley*, 6 W. R. 180).

Result of proceedings before chief clerk to be embodied in form of short certificate, &c.

XXXII. The directions to be given by the Master of the Rolls or any Vice-Chancellor for or touching any proceedings before his chief clerk shall require no particular form, but the result of such proceedings shall be stated in the shape of a short certificate to the judge (*q*), and shall not be embodied in a formal report, unless in any case the judge shall see fit so to direct; and when the judge shall approve of such certificate or report he shall sign the same in testimony of his adopting the same.

Chief clerk's certificate.

(*q*) As to the practice of attending to settle the certificate, see Cons. Ord. XXXV. 26, p. 147, *post*.

The certificate is not to set out the decree or order on which it is founded, but is to refer to it as directed by Ord. XXXV. 46, 47, p. 153, *post*.

In cases of account.

In cases of account the certificate is not to set out the account to refer to it as directed by Ord. XXXV. 46, p. 153, *post*.

Where the chief clerk referred the accounts to an accountant (under sect. 43), and filed his report as part of the certificate, it was held irregular, *Hill* v. *King*, 9 Jur. N. S. 527; and see *Re Agriculturist Cattle Insurance Society*, 3 D. F. J. 194.

15 & 16 Vict. c. 80, s. 32.

The certificate may state facts and reserve the point to which they refer for the consideration of the Court, *Stott* v. *Meanock*, 10 W. R. 605, or it may be made without prejudice to some questions reserved for the opinion of the Court, *Waterton* v. *Burt*, 39 L. J. Ch. 421.

Chief clerk may state facts and reserve point.

A certificate which finds an amount to be due should be in such a form as to enable the Court to ascertain in what way the amount found due was arrived at, and, therefore, where an inquiry had been directed as to what was due from the defendants to the plaintiff for work done and materials supplied under several contracts, and the chief clerk by his certificate simply stated the amounts which he found due on the several contracts, without giving any further particulars or stating the grounds for his conclusion, the certificate was discharged without prejudice to any questions, *M'Intosh* v. *Great Western Railway Company*, 1 D. J. S. 443.

But must state the grounds of the result arrived at.

No exceptions to lie to certificate, &c.

XXXIII. No exceptions shall lie to any certificate or report of the chief clerk, although signed and adopted by the judge; but any party shall, either during the proceedings before such chief clerk, or within such time after such proceedings shall have been concluded, and *before the certificate or report shall have been signed and adopted*, as the Lord Chancellor shall by any general order direct (*r*), be at liberty to take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding, when it is brought by the chief clerk to a conclusion (*s*).

Parties at liberty to take opinion of judge upon any particular point.

(*r*) The application under this section is usually by summons, see *Cooper* v. *Everitt*, 2 W. R. 388.

The time is four clear days, Cons. Ord. XXXV. r. 49, p. 153, *post*.

Objections to certificate—when and how to be made to the judge.

The objections to the chief clerk's finding should, if possible, be taken before the certificate is made, and at once referred to the judge in chambers, so as to save expense (*Parr* v. *Lovegrove*, 6 W. R. 201). So in *Halliley* v. *Henderson* (4 Jur. N. S. 202), it was held that a summons taken out by a creditor after the chief clerk has made his certificate, should be referred to the judge in chambers, and not adjourned into Court. See Cons. Ord. XXXV. r. 43, p. 150, *post*.

The opinion of the judge as to the principle on which an account should be taken was obtained by motion, *Robertson* v. *Norris*, 1 Giff. 428; and see *Twyford* v. *Trail*, 3 M. & C. 650, there cited.

(*s*) See for the practice of taking the judge's opinion on the certificate as a whole, *Morgan* v. *Hatchell*, 19 Beav. 86.

Certificate, &c., signed and adopted by judge, binding on all parties, unless discharged or varied.

XXXIV. *When any certificate or report of the chief clerk shall have been signed and adopted by the judge* (*t*) the same shall be filed in like manner as reports are now filed, and shall thenceforth be binding on all the parties to the proceedings (*u*), unless discharged or varied, either at chambers or in open Court, according to the nature of the case, upon application by summons or motion (*x*) within such time as shall be prescribed in that

15 & 16 Vict. c. 80, s. 34.

behalf by any general order of the Lord Chancellor (*y*); and nothing herein contained shall prejudice or affect the power of the Court at any time to open any such certificate or report upon the same or the like grounds as any report of a Master of the said Court which has been absolutely confirmed may now be opened (*z*).

(*t*) See Cons. Ord. XXXV. r. 51, p. 153, *post*, for cases where parties who had not moved to vary were held bound by the certificate, see note (*z*), *infra*.

Certificate how far an estoppel.

(*u*) The fact of a claim being disallowed by the chief clerk in one suit, was held no bar to its being prosecuted in another, *Teed* v. *Beere*, 7 W. R. 394; but see *contra*, *Thomas* v. *Griffiths*, 2 Giff. 504, 2 D. F. J. 562. See, however, as to new claimants coming in after the certificate is adopted, note (*m*), to Cons. Ord. XXXV. r. 12, p. 140, *post*.

Application to vary how made.

(*x*) The usual mode of proceeding to vary a certificate is by summons; and the Court will not vary a certificate on further consideration, unless objected to in the usual way, *Lambe* v. *Orton*, 8 W. R. 111. The application to vary will be adjourned into Court, if necessary, and as to what costs are to be paid by the unsuccessful party, see *Re General Estates Coy.*, L. R. 8 Eq. 123; *Alcock* v. *Gill*, W. N. (1870), 270.

Coming on with further consideration.

If the cause is coming on to be heard on further consideration, such hearing and the application to vary will come on together, *Crompton* v. *Huber*, 3 W. R. 347; *Hudson* v. *Carmichael*, 18 Jur. 852. And where such hearing and application to vary come on together, it may be necessary to appeal from the order as a whole, see *Bloxam* v. *Whipham*, 8 W. R. 2.

Where error is apparent.

When there was error apparent in the chief clerk's certificate, and the decree founded thereon, the Court altered and corrected both the decree and the certificate, without a rehearing, notwithstanding this section (*Cradock* v. *Owen*, 2 Sm. & G. 241); and cf. *Purcell* v. *Manning*, 3 Jur. N. S. 1070, Ord. XXIII. 11; where, in a somewhat similar case, the Court gave leave to move to vary the chief clerk's certificate, and to present a petition of rehearing. As to rectifying a direction to take accounts on rehearing see *Pennell* v. *Millar*, 23 Beav. 172.

Evidence on application to vary.

Affidavits not used before the chief clerk cannot be used on applications to vary his certificate, *Re Hooper*, 9 Jur. N. S. 570; and see *Whitworth* v. *Whyddon*, 2 M. & G. 56; *Fleming* v. *East*, Kay, App. lii. Nor was cross-examination in Court allowed on those affidavits which were used before him, *Dawkins* v. *Morton*, 10 W. R. 339.

Time for summons to vary certificate.

(*y*) The time is eight clear days from the filing of the certificate, Ord. XXXV. r. 52, p. 154, *post*, except in cases of certificates to be acted upon by the Paymaster-General without further orders, in which case the time is two clear days from the filing, Ord. XXXV. r. 53, *ibid.*; and certificates passing receiver's accounts may be approved and acted on at once, Cons. Ord. XXXV. p. 154, *post*.

To be *obtained* within eight days.

Where the summons had been *obtained* within the eight days, even though not returnable until after that time, it was held sufficient, *Wycherley* v. *Barnard*, John. 41, but see *Henshaw* v. *Angell*, L. R. 9 Eq. 451; and where it is impossible to move on a seal day within the eight days the Court allows the motion to be made on a day not a seal day, and to be saved till next seal, *Cross* v. *Maltby*, 8 W. R. 646. The eight days ran during vacations (*Ware* v. *Watson*, 7 D. M. G. 739; and see *Re Jones*, 8 W. R. 56).

Leave to move to vary, though the eight days had elapsed, was granted in *Briant* v. *Tibbut*, 17 W. R. 274.

When a motion was made for payment of money found due on a certificate before the eight days had elapsed, the Court ordered the motion to stand over till the expiration of that period (*Douthwaite* v. *Spensley*, 18 Beav. 74).

Varying after eight days.

(*z*) A certificate when confirmed cannot be discharged or varied, except under very special circumstances (*Howell* v. *Kightly*, 8 D. M. G. 325;

Reeve v. *Reeve*, W. N. (1871) 52), for the certificate, whatever effect it may have on the hearing on further consideration, is conclusive against parties, who have neither taken out a summons nor moved to have it varied (*Smith* v. *Armstrong*, 6 D. M. G. 150; see *Jaquet* v. *Jaquet*, 7 W. R. 543; *Leigh* v. *Turner*, 14 W. R. 361; *Aspinall* v. *Brown*, 29 Beav. 462; *Ware* v. *Watson*, 7 D. M. G. 739), and it may operate to revive a statute barred claim, *Prowse* v. *Spurgin*, L. R. 5 Eq. 99. 15 & 16 Vict. c. 80, s. 34.

See *Cradock* v. *Owen*, 2 Sm. & G. 241, as to varying error apparent in the certificate after the eight days without a rehearing, and as to rectifying directions to take accounts on a rehearing, see *Pennell* v. *Millar*, 23 Beav. 172. Error *apparent* rectified after the eight days.

When the chief clerk carried out a sale which it was the duty of the judge to approve (see Cons. Ord. XXXV. r. 51, p. 154, *post*), before the eight days had elapsed, an application to re-open biddings might formerly be granted (*Bridger* v. *Penfold*, 1 K. & J. 28; *Osborne* v. *Foreman*, 8 D. M. G. 122; 6 H. L. Cas. 556; *Waterhouse* v. *Wilkinson*, 1 H. & M. 636; *Ewing* v. *Waite*, L. R. 1 Eq. 440); but this practice is now abolished by the "Sale of Land by Auction Act," 1867 (30 & 31 Vict. c. 48), sect. 7, which enacts that, "The practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall, from and after the time appointed for the commencement of this Act (viz., Aug. 1, 1867), be discontinued, and the highest *bonâ fide* bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any), shall be declared and allowed the purchaser, unless the Court or judge shall, *on the ground of fraud* or *improper conduct in the management of the sale*, upon the application of any person interested in the land (such application to be made to the Court or judge before the chief clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or judge shall think fit." Certificate concerning sale. Opening biddings abolished. 30 & 31 Vict. c. 48, ss. 7–9. Except in cases of fraud.

Sect. 5 of the same Act enacts, "That the particulars or conditions of sale by auction of any land shall state whether such land will be sold *without reserve*, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person."

In order to entitle parties to open the biddings after a sale by auction under the Court since the passing of the *Sales of Land by Auction Act*, 1867, there must be either fraud or such misconduct as borders on fraud, and for a consideration of the circumstances necessary to justify the presumption of such misconduct, see *Delves* v. *Delves* L. R. 20 Eq. 77; *Brown* v. *Oakshott*, W. N. (1869) 207; *Griffiths* v. *Jones*, L. R. 15 Eq. 279; *Guest* v. *Smith*, L. R. 5 Ch. 551, where the purchaser was by reason of his fiduciary position disqualified. Or misconduct bordering on fraud.

XXXVI. From and after the first day of Michaelmas term, one thousand eight hundred and fifty-two, all or any of the powers, authorities, and jurisdiction given to the Masters in Ordinary of the said court by any Act or Acts then in force may be exercised by the Master of the Rolls and Vice-Chancellors respectively. All powers possessed by masters to be exercised by judges.

[Sect. 37 gave power to the judges to dispose in open court of causes, &c., then pending before the Masters.]

XXXVIII. It shall be lawful for the Lord Chancellor, with the advice and consent of the Master of the Rolls Power to Lord Chancellor, with advice,

15 & 16 Vict. c. 80, s. 38.

&c., of judges to make rules and orders for regulating the mode of procedure at chambers, payment of fees, &c.

and Vice-Chancellors, or any two of them, and they are hereby required, forthwith to make and issue general rules and orders for regulating the times and form and mode of procedure, before the Master of the Rolls and Vice-Chancellors respectively sitting at chambers, and their respective chief clerks, and generally the practice of the said court in respect of the matters to which this Act relates, and for regulating the fees and allowances to solicitors of the said court in respect to such matters, and also for regulating the fees to be payable by suitors of the said court to the officers thereof in respect of the business to be conducted before the Master of the Rolls and Vice-Chancellors respectively sitting at chambers, and their respective chief clerks; and such rules and regulations may from time to time be rescinded, altered, varied, or added to by the like authority; and all such rules and regulations as aforesaid shall take effect as general orders of the said court: Provided always, that no greater amount of fees shall be payable by the suitors of the said court to the officers thereof, in respect of the business to be conducted before the Master of the Rolls and the Vice-Chancellors respectively sitting at chambers, and their respective chief clerks, than is now levied in respect of similar or analogous business in the Master's offices.

[Sect. 39 related to the conduct of business then pending before the Masters.]

Power to judges at chambers to take the opinion of conveyancing counsel in certain matters.

XL. From and after the first day of Michaelmas term, one thousand eight hundred and fifty-two, it shall be lawful for the Court or for any judge thereof when sitting at chambers to receive and act upon the opinion of conveyancing counsel (*a*) in actual practice, to be nominated as hereinafter mentioned, in all cases in which, according to the present practice of the Court and of the Master's office, it has been usual for the Master to require or receive the opinion of conveyancing counsel for his aid and assistance in the investigation of the title to an estate, with a view to an investment of money in the purchase or

on mortgage thereof, or with a view to a sale thereof (*b*), or in the settlement of a draft of a conveyance, mortgage, settlement, or other instrument (*c*), or otherwise, and in such other cases as the Lord Chancellor shall by any general order direct: but it shall be competent for any party to object to any opinion of any such counsel when he shall deem it open to objection, and thereupon the point in dispute shall be disposed of by the Court, or by the judge sitting in chambers, according to the nature of the case.

15 & 16 Vict., c. 80, s. 40.

Parties may object to such opinion, which may be disposed of in chambers or open Court.

(*a*) See Cons. Ord. II., *infra*.

Cons. Ord. II.

(*b*) The abstract of title is directed to be referred to the conveyancing counsel on sales under the order of the Court by 15 & 16 Vict. c. 86, s. 56, which provides that, "Before any estate or interest shall be put up for sale "under a decree or order of the Court of Chancery, an abstract of the title "thereto shall, with the approbation of the Court be laid before some con- "veyancing counsel to be approved by the Court for the opinion of such "counsel thereon, to the intent that the said Court may be the better "enabled to give such directions as may be necessary respecting the condi- "tions of sale of such estate or interest, and other matters connected with "the sale thereof; and when an estate or interest shall be so put up for "sale, a time for the delivery of the abstract of title thereto to the "purchaser or his solicitor shall be specified in the said conditions of sale;" but the Court has a discretion and need not refer the title to them, *Re Jones*, 7 W. R. 171, 523, 1 Jur. N. S. 817; *Ralph* v. *Horton*, 19 W. R. 220; *Gibson* v. *Woollard*, 5 D. M. G. 835. And where land is ordered to be sold in lots, and one conveyance has been settled by the conveyancing counsel, it may be adopted by the chief clerk for all the other lots in cases where special circumstances exist to render such a course inconvenient, *Re Eyre*, 4 K. & J. 268.

Reference to conveyancing counsel on sales by Court. 15 & 16 Vict. c. 86, s. 56. Discretion of Court. Model conveyance.

The judge in chambers will, in a proper case, direct the opinion of one of the conveyancing counsel to be taken, *Yates* v. *Plumbe*, 2 Sm. & G. 174.

Discretion of Court.

For the practice as to reference to chambers and the conveyancing counsel on reinvestment in land under the Lands Clauses Act, sect. 69, see note at foot of p. 38, *ante*; and on sales under the Settled Estates Act, see note to 19 & 20 Vict. c. 120, s. 10, *post*.

Under Lands Clauses Act and Settled Estates Act.

(*c*) In ordinary cases, where a deed has to be approved by the Court, the Court has a discretion whether it will refer a matter to the conveyancing counsel or not, see *Blaxland* v. *Blaxland*, 9 Hare, App. lxviii.; but as a general rule, where *infants*, or persons under disability are concerned, the title is referred to, or the conveyance settled by, the conveyancing counsel. And as to the manner of settling deeds to be executed by incapacitated persons, under the decree of the Court, the consideration monies having been paid into Court, see *Harvey* v. *Brooke*, 9 Hare, App. xi.; where it was held that the cause might stand over, and on its being again in the paper, the plaintiff being prepared with an affidavit of the correctness of the engrossment of the deed, and the certificate of the Accountant-General of the payment of the money into Court, the Court would direct the registrar to sign a memorandum that the deed produced was the deed to be executed by the incapacitated person. The deed is first sent to the judge's chambers, and then to the conveyancing counsel (*Re Bennett*, 18 Jur. 33; see *Pegg* v. *Wisden*, 16 Jur. 1105).

To approve deeds where infants, &c., are interested

As to the manner of setting deeds to be executed by incapacitated persons under the decree of the Court, see *Harvey* v. *Brooke*, 9 Hare, App. xi.; *Re Bennett*, 18 Jur. 33; *Pegg* v. *Wisden*, 16 Jur. 1105.

15 & 16 Vict. c. 80, s. 40.

When conveyancing counsel dispensed with.

But where the expense of a reference to the conveyancing counsel would have been out of proportion to the amount to be settled, the trusts were inserted in the order on the petition, *Chamberlain* v. *Chamberlain*, 1 Sm. & Giff. App. xxviii.; nor is it an imperative rule, that the title of land in which the purchase monies of settled lands are about to be invested must in every case be laid before the conveyancing counsel of the court. See note (*b*) *supra*.

Power to Lord Chancellor to nominate six conveyancing counsel to be of ten years' practice, &c.

XLI. It shall be lawful for the Lord Chancellor to nominate any number of conveyancing counsel in actual practice, not less than six, who shall have practised as such for ten years at least, to be the conveyancing counsel (*d*) upon whose opinion the Court, or any judge thereof, may act in any of the cases last before mentioned, and to supply vacancies in such list from time to time, and to distribute the business among such counsel in such order and manner as to the Lord Chancellor shall seem fit (*e*).

(*d*) The fees of the conveyancing counsel are in the taxing-master's discretion, *Rumsay* v. *Rumsay*, 21 Beav. 40.

Reference to one counsel in particular.

(*e*) The Court will not generally direct a reference to one conveyancing counsel in particular (*Re Martin*, 22 L. J. Ch. 248); but it may do so where the circumstances of the case render it expedient, Cons. Ord. II. 5, *infra*.

Compare Consolidated Order II., which provides as follows:—

Conveyancing Counsel of the Court.

Rule 1. Business referred to conveyancing counsel, to be distributed in rotation.

1. *The business to be referred to the conveyancing counsel nominated by the Lord Chancellor, under the stat.* 15 & 16 *Vict. c.* 80, *s.* 41, *shall be distributed among such counsel in rotation by the first clerk to the registrars for the time being, and during his occasional or necessary absence by the second clerk to the registrars for the time being, and during the occasional or necessary absence of both such clerks, then by such one of the other clerks to the registrars as the senior registrar for the time being may nominate for that purpose.*

Rule 2. Duty of person distributing.

2. *The clerk making such distribution shall be responsible for the business being distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession of conveyancing counsel to whom such business may be referred; and it shall be his duty to keep a record of such references, with*

proper indexes, and to enter therein all such references, with the dates when the same are made.

15 & 16 Vict. c. 80, s. 41.

Rule 3. Opinion, &c., of the conveyancing counsel, how obtained.

3. *When the Court or a judge at chambers directs any business to be referred to any such conveyancing counsel, a short memorandum or minute of such direction shall be prepared and signed, by the registrar if the same shall have been given in Court, or by the judge's chief clerk, if given in chambers; and the party prosecuting such direction, or his solicitor, shall take such memorandum or minute to the registrar's clerk, whose duty it is to make such distribution as aforesaid; and such clerk shall add at the foot thereof a note specifying the name of the conveyancing counsel in rotation to whom such business is to be referred; and such memorandum or minutes shall be left by the party prosecuting such direction, or his solicitor, with such conveyancing counsel, and shall be a sufficient authority for him to proceed with the business so referred.*

Rule 4. Counsel in rotation unable or declining to act.

4. *In case the conveyancing counsel in rotation shall from illness or from any other cause be unable or decline to accept any such reference, the same shall be offered to the other conveyancing counsel appointed as aforesaid, successively, according to their seniority at the bar, until some one of them shall accept the same.*

Rule 5. Liberty to direct or transfer reference to any one of such counsel in particular.

5. *The preceding Rules of this Order are not to interfere with the power of the Court, or of the judge at chambers, to direct or transfer a reference to any one in particular of the said conveyancing counsel, where it appears to the Court or the judge to be expedient.*

It is provided by Cons. Ord. XL. r. 30, that—

Con. Ord. XL. Rule 30. Costs of drafts settled by private counsel before or after they are settled by conveyancing counsel of court.

Where, in pursuance of any direction by the Court or a judge in chambers, drafts are settled by any of the conveyancing counsel of the Court (f), the expense of procuring such drafts to be previously or subsequently settled by other counsel on behalf of the same parties on whose behalf such drafts are settled by the conveyancing counsel of the Court, shall not be allowed on taxation as between party and party, or as between solicitor and client,

15 & 16 Vict. c. 80, s. 41.

unless the Court or the judge in chambers shall otherwise direct.

(*f*) See further as to costs where a purchaser or mortgagee insists on employing private counsel in addition to the conveyancing counsel of the court, *Re Morgan Jones*, 6 W. R. 762; *Nicholson* v. *Jeyes*, 1 Sm. & Giff. App. xiii.

Assistance of accountants, merchants, &c.

* The Chancery Division, Judicature Act, 1873, s. 34 (2).

XLII. It shall be lawful for the said Court * or any judge thereof, in such way as they may think fit, to obtain the assistance (*g*) of accountants (*h*), merchants, engineers, actuaries, or other scientific persons (*i*), the better to enable such Court or judge to determine any matter at issue in any cause or proceeding (*k*), and to act upon the certificate of such persons (*l*).

Assessors under Judicature Act.

(*g*) See now Judicature Act, 1873, 56th and following sections, as to trial with assessors, and Ord. XXXVI. r. 28.

Accountants.

(*h*) See as to the employment of accountants, *Re London, Birmingham, and Bucks Railway Company*, 6 W. R. 141. It seems they need not always be employed in the presence of the parties (*ibid.*).

Expert cannot call witnesses.

(*i*) The expert has no jurisdiction to call witnesses, *Morris* v. *Llanelly Rly. Coy.*, W. N. (1868) 46.

References to experts.

(*k*) The object of the section is to facilitate inquiries necessary to found a decree; thus, complicated claims of creditors, which would have had to go to arbitration if tried at common law, were referred to chambers to be disposed of by the judge with the aid of an accountant, *Mildmay* v. *Lord Methuen*, 1 Drew. 216 (where it was held that the judge cannot delegate this power to the chief clerk); *M'Intosh* v. *G. W. R. Coy.*, 3 Sm. & Giff. 146; and the amount of encroachment of alluvium on a sea-shore was referred to an expert in *A.-G.* v. *Chambers*, 4 De G. & J. 55, 58. The section does not give a judge power to adjourn the decision of a cause for further inquiries from engineers or others in a case where the plaintiff has a clear right to an injunction, although the injunction may be a very difficult one for the defendant to obey, *A.-G.* v. *Colney Hatch Asylum*, 4 L. R. Ch. 146, where an injunction was granted to restrain a nuisance, and the Court of Appeal reversed an order by which it was referred to an engineer to inquire how the nuisance might be abated: so a general inquiry as to what ought to be done to preserve the plaintiff's light and air was refused in *Stokes* v. *City Offices Coy.*, 13 W. R. 537. See *Case* v. *Midland Ry. Coy.*, 27 Beav. 247 (where an inquiry as to the effect of using steamboats on a canal was directed); and after the decree the opinion may be taken as to time which ought to be allowed for carrying it into effect. *Att.-Gen.* v. *Merthyr Tydfil Local Board of Health*, 5 W. N. (1870) 148.

Judge cannot delegate to chief clerk.

When reference is re-used.

(*l*) The report of an expert under this section is not to decide the question referred to him, like an arbitrator's award, though it may give material information and guidance to the judge, *Ford* v. *Tynte*, 2 D. J. S. 127, where it was said affidavits might be received in opposition, *Adamson* v. *Gill*, 16 W. R. 306.

The chief clerk must not file such report as part of his certificate, see note (*q*), p. 128, *ante*.

Taxing-master to regulate fees to convey-

XLIII. The allowances in respect of fees to such conveyancing counsel, accountants, merchants, engineers, actuaries, and other scientific persons, shall be regulated

by the taxing master of the said court, subject to an appeal to the judge to whose court the cause or matter shall be attached, whose decision shall be final (*m*).

15 & 16 Vict. c. 80, s. 43.

ancing counsel, &c., subject to appeal.

(*m*) See *Meymott* v. *Meymott*, 33 Beav. 590.

This section does not authorise a reference to the taxing-master of accounts not connected with bills under taxation (per L. J. Turner, in *King* v. *Savery*, 8 D. M. G. 311).

[The omitted sections, 44—59, relate to the salaries and pensions of the judges, chief and junior clerks, and other officers of the court (see p. 123, *ante*). Section 59, is repealed by the Chancery Funds Act, 35 & 36 Vict. c. 44, 2nd pt. of 2nd schedule, *post*.]

[Sect. 60 allowed retiring Lord Chancellors to deliver written judgment on cases heard by them within six weeks after resignation.]

ORDERS AS TO PROCEEDINGS IN CHAMBERS.

CONSOLIDATED ORDER XXXV.

Business in Chambers.

Cons. Ord. XXXV. Proceedings in Chambers.

1. *The business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively, while sitting at Chambers, shall, in addition to the matters mentioned or referred to in the stat.* 15 *&* 16 *Vict. c.* 80, *s.* 26 (*a*), *comprise the following matters* (*b*), *that is to say :—*

Rule 1. Business to be disposed of in chambers.

(1.) Applications for payment to any person of the dividends or interest of any stocks, funds, or securities standing to the credit of any cause or matter depending to the separate account of such person (*c*).

Applications for payment out of court.

(2.) Applications under the stat. 36 Geo. 3, c. 52, s. 32, in all cases where the sum paid into the Bank or the stock transferred into the name of the Accountant-General, under such section, does not exceed three hundred pounds cash, or three hundred pounds stock, as the case may be (*d*).

Applications under Legacy Duty Act.

(3.) Applications under the stat. 10 & 11 Vict. c. 96, intituled "An Act for better securing Trust Funds, and for the Relief of Trustees," and the stat. 12 & 13 Vict. c. 74, intituled "An Act for the further Relief of Trustees," in all cases where the trust fund does not exceed three hundred pounds cash, or three hundred pounds stock, as the case may be (*e*).

Applications under Trustee Relief Act.

Cons. Ord. XXXV. Proceedings in chambers.

Applications under Trustee Acts, for sale under decree.

(4.) Applications under the "Trustee Act, 1850," and the stat. 15 & 16 Vict. c. 55, intituled "An Act to extend the provisions of 'The Trustee Act, 1850,'" in all cases where any degree or order shall have been made by the Court for the sale or conveyance of any lands, manors, messuages, tenements, or hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein (*f*).

Applications on behalf of infants under Property Law Amendment Act.

(5.) Applications on behalf of infants under the stat. 1 Wm. 4, c. 65, ss. 12, 16 and 17, in all cases where the infant is a ward of the Court, or the administration of the estate of the infant or the maintenance of the infant is under the direction of the Court (12th Nov. 1856) (*g*).

Applications under Copyhold Acts.

(*a*) Applications under the Copyhold Acts respecting securities or money in Court are to be made by summons in chambers (Chancery Funds Amended Orders, 1872, r. 15, pt. II., *post*). See p. 123, *ante*, and note there, for an account of chamber business.

18 & 19 Vict. c. 134, s. 16.

(*b*) These orders were made under powers conferred by 18 & 19 Vict. c. 134, s. 16, which enacted that, "whereas the Court of Chancery was empowered to make orders in respect of the disposition of trust funds and other matters under its control in a summary way upon petition or motion, but not upon application in chambers; the business to be disposed of in chambers should comprise such of the said matters as any general order should direct." So that the doubt expressed in *Re Rye*, 3 W. R. 198; 1 Jur. N. S. 222, whether orders could be made in chambers, under the Trustee Relief Act, except on petitions was removed.

Principal sums not paid out on summons;

(*c*) The clause does not apply to the payment out of *principal* sums, *Joad* v. *Ripley*, 3 Jur. N. S. 432, and notes thereto; but see *Thorpe* v. *Owen*, 2 Sm. & Giff. App. i., and where one of three children applied for payment out of court of 379*l.*, her share of a fund in court, leave was given to apply in chambers for the shares of the other children, *Winkworth* v. *Winkworth*, 32 Beav. 233, and see cases cited under the Lands Clauses Act, note (*h*), p. 39, *ante*.

nor arrears of interest exceeding £300.

Arrears of interest *exceeding* 300*l.* can still only be paid out on petition, *Joad* v. *Ripley*, 3 Jur. N. S. 432; *Daniell* v. *Daniell*, 28 L. T. 80; but see note (*o*), p. 72, *ante*.

(*d*) See the Legacy Duties Act, *ante*, p. 64.

(*e*) As to payment out under the Trustee Relief Act, see *ante*, p. 71, 72. A person applying by petition instead of in chambers had to pay the extra costs incurred, *Clark* v. *Ward*, 14 W. R. 241.

(*f*) As to vesting orders under the Trustee Acts, see note (*p*), p. 81, *ante*.

(*g*) As to orders under 1 Will. 4, c. 65, ss. 12, 17, to renew or grant leases on behalf of infants, see note (*a*) to the Settled Estates Act, *post*.

[Rules 2 and 3 provided the ordinary forms of summons in chambers.]

[Rule 4 provided the form of the summons by the chief clerk under 15 & 16 Vict. c. 80, s. 30 (see p. 126, *ante*).]

Rule 5. Preparing, sealing, &c., of summons.

5. Summonses shall be prepared by the parties, and sealed (*h*) by one of the clerks, at the chambers of the

judge from whose chambers they are issued, with a seal provided for those chambers; and a copy of such summons shall be left at the judge's chambers by the party obtaining such summons. Cons. Ord. XXXV. Proceedings in chambers.

(*h*) A summons after it has been sealed cannot be altered except on application at chambers; 1st Regul. as to business, August, 1857.

6. In cases of applications under the stat. 15 & 16 Vict. c. 86, ss. 45 and 47, applications originating in chambers for guardianship and maintenance of infants, and all other applications originating in chambers, a duplicate of the summons shall be filed in the Record and Writ Clerks' Office; and in cases where service is required, the copies served shall be stamped in the manner provided by the stat. 15 & 16 Vict. c. 86, s. 46 (*i*). Administration summons or other summons originating in chambers.

(*i*) See this section, *post.*

7. Where proceedings originate in chambers, the original summons shall be served seven clear days before the return thereof (*k*). All other summonses, not being summonses referred to in the 4th Rule of this Order, shall be served two clear days before the return thereof. Rule 7. Summons to be served seven days before return thereof.

(*k*) The summons may be *returnable* after the seven days, *Wycherley* v. *Barnard*, Johns. 41. Service of summons.

8. Where proceedings originate in chambers, and where from any cause the summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the judge; and such endorsements shall be sealed at the judges chambers; and the service of the copy so indorsed and sealed shall have the same force and effect as the service of an original summons; and where any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed. Rule 8. New summons.

9. Where proceedings originate in chambers, the parties served shall, before they are heard in chambers enter ap- Rule 9. Appearances on proceed-

Cons. Ord. XXXV. Proceedings in Chambers.

pearances in the Record and Writ Clerks' Office, and give notice thereof.

ings in chambers.

10. Where any of the parties summoned to attend the judge in chambers fail so to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if, considering the nature of the case, he think it expedient so to do.

Rule 10. Proceeding *ex parte* in case of party summoned making default.

Rule 11. Reconsideration of *ex parte* proceedings.

11. Where the judge has proceeded *ex parte*, such proceedings shall not in any manner be reconsidered in the judge's chambers, unless the judge, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of wilful delay or negligence. And in such case, the costs occasioned by his non-attendance shall be in the discretion of the judge, who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such costs as to such judge may seem meet.

Costs.

Rule 12. Claimants not coming in to prove, &c., excluded.

12. Where a decree or order is made, whether in Court or in chambers, directing an account of debts, claims (*l*) or liabilities, or an inquiry for heirs, next of kin, or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement* shall be excluded (*m*) from the benefit of the decree or order.

* See rules 35, *et seq.*, p. 149.

Creditors and claimants.

(*l*) See rules 37, *et seq.*, and note (*h*), p. 149, as to creditors and other claimants in chambers.

Claimants coming in after time fixed by advertisement.

(*m*) Claimants may come in after the time fixed by special leave, on application made by summons, see r. 43, p. 150, *post*.

After apportionment, new claimants may come in during the prosecution of the decree, at any time before the fund has been administered. See r. 43, p. 150, *Gillespie* v. *Alexander*, 3 Russ. 130; and other cases cited in note (*v*), to r. 19, p. 144, *post*.

After distribution.

After distribution under a decree persons making further claims may proceed *by action* against those persons who have received the assets, but not against the executors, who are indemnified by the decree, see *Cleyg* v. *Rowland*, 3 L. R. Eq. 368; *David* v. *Frowd*, 1 M. & K. 209; *Good* v. *Blewitt*, 19 Ves. 339; *Greig* v. *Somerville*, 1 R. & M. 338; *Thomas* v. *Griffith*, 2 Gif. 504; 2 D. F. J. 555.

For the practice where a fund becomes distributable after a long period, and only some creditors come in to claim, see *Ashley* v. *Ashley*, L. R. 1 Ch. Div. 244, and cases cited there.

In *Prowse* v. *Spurgin*, L. R. 5 Eq. 99, the plaintiff in the cause, a residuary legatee was held liable, more than twenty years after the testator's death, to pay legacies, owing to the form of the certificate, to which he had assented.

Cons. Ord. XXXV. Proceedings in Chambers.

13. Where a decree or order is made, whether in Court or in chambers, directing any property to be sold, unless otherwise ordered, the same shall be sold with the approbation of the judge to whose Court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by the judge, and all proper parties shall join in the sale and conveyance as the judge shall direct (*n*).

Rule 13. Sale under decree or order.

(*n*) The judge may (1) fix *reserved biddings* upon a sale, (2) direct *deposits* to be made, and appoint persons to receive the same, and (3) receive *proposals for private contract*. See the 61st rule of this order.

Questions as to sale considered in chambers.

The conduct of the sale is ordinarily entrusted to the plaintiff (*Knott* v. *Cottee* (No. 4), 27 Beav. 33), even though he would not have been entitled thereto according to the contract if performed without suit (*Dale* v. *Hamilton*, 10 Hare, App. vii.). When, however, it appears to be for the benefit of all parties it may be given to a defendant, *Knott* v. *Cottee*, *ubi supra*. When a sale is directed, every party to the suit having the title deeds is bound to facilitate the sale (*ibid.*). On a sale under the 15 & 16 Vict. c. 86, s. 48, *post*, the conduct of the sale is given to the first mortgagee (*Hewitt* v. *Nanson*, 7 W. R. 5).

Conduct of sale.

Under 15 & 16 Vict. c. 86, s. 48.

A purchaser under a decree cannot generally take possession (*Hutton* v. *Mansell*, 2 Beav. 260), or pay his money into court, *Denning* v. *Henderson*, 1 De G. & Sm. 689, without accepting the title; but see *Dempsey* v. *Dempsey*, 1 De G. & Sm. 691. And an application to pay the money into Court, and to be let into possession without prejudice to objections to the title, will be refused (*Rutter* v. *Marriott*, 10 Beav. 33; but see *Marfell* v. *Rudge*, 2 Y. & Coll. Exch. R. 566).

Effect of taking possession or paying purchase-money into court upon objections for title.

A purchaser under a decree of the Court will not be relieved from his purchase merely because there are irregularities in the decree (*Baker* v. *Sowter*, 10 Beav. 343). *Secus* if there is a want of jurisdiction or parties (*ibid.*; and see, as to equitable interests being bound by the decree, *Re Williams*, 5 De G. & Sm. 515). A purchaser under a decree is entitled to his costs when the title is bad (*Smith* v. *Nelson*, 2 S. & S. 557).

Relieving purchaser from purchase.

Costs where title bad.

The practice of opening biddings on sales under the Court, except in cases of fraud, is abolished by the 30 & 31 Vict. c. 48, quoted p. 131, *ante* (where see notes); and as to *reserving* biddings, see 13 & 14 Judges' Regul. p. 167, *post*, and for the mode of certifying the result of the sale, see 15th Judges' Regul. Appendix, p. 168, *post*.

Open biddings.

If the estate is not sold, there must be a new sale by auction, unless the judge authorises a sale by private tender or otherwise, *Berry* v. *Gibbons*, L. R. 15 Eq. 150.

14. Where matters in respect of which summonses have been issued are not disposed of upon the return of the summons, the parties shall attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter (*o*).

Rule 14. Further consideration in chambers.

Cons. Ord. XXXV. Proceedings in Chambers.

(*o*) As to adjournments of causes in chambers, and the mode of bringing them on after such adjournment, see 18th Regul. as to business, Aug. 1857, p. 170, *post*.

Adjournments in chambers.

The costs of obtaining a new appointment, such being unnecessary, will be disallowed, *Re Catlin*, 18 Beav. 512, but this applies only where a regular adjournment has been made, and where a witness had been summoned for examination, but, having received notice that the examination would not be proceeded with, did not attend, and no adjournment was thereon made, it was held that he could not be forced to attend again without a fresh summons being taken out, *Lawson* v. *Stoddart*, 12 W. R. 286.

New appointment not necessary.

Further consideration dispensed with.

Where small leaseholds had been ordered to be sold, the proceeds were distributed among numerous parties, upon the certificate of the chief clerk, *without* adjournment, to save expense, the purchasers being served with a summons to show cause in chambers why the proceeds should not be distributed by the chief clerk (*Thorp* v. *Owen*, 2 Sm. & G. App. i.).

Rule 15. Proceedings under decree or order.

15. In all cases of proceedings in chambers under any decree or order, the party prosecuting the same shall leave a copy of such decree or order at the judge's chambers, and shall certify the same to be a true copy of the decree or order as passed and entered (*p*).

Documents to be left at chambers.

(*p*) A note stating the names of the solicitors for all parties, and for whom they are concerned, must also be left (5th and 6th Regul. as to business, Aug. 1857, p. 166, *post*).

Rule 16. Summons to proceed with accounts or inquiries.

16. Upon a copy of the decree or order being left, a summons shall be issued to proceed with the accounts or inquiries directed (*q*); and upon the return of such summons, the judge, if satisfied by proper evidence that all necessary parties have been served with notice of the decree or order, shall thereupon give directions as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries (*r*), and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary.

Directions.

Evidence.

Directions as to taking accounts.

(*q*) See sect. 54 of 15 & 16 Vict. c. 86,, *post*, and notes thereto, as to special directions for taking accounts and as to the ordinary directions, see Orders XV. and XXXIII., pt. II., *post*.

Cons. Ord. XL. r. 28, 29.

(*r*) By Cons. Ord. XL., r. 28, 29, it is provided that—

Costs of parties attending chambers without leave of judge.

28. *Parties attending any proceeding in chambers, without having obtained the previous leave of the judge to attend the same, shall not be allowed any costs of such*

attendance, unless by special order of the Court or judge.

Cons. Ord. XXXV. Proceedings in Chambers.

As to the practice of hearing counsel in chambers, see sect. 28 of the Act, p. 125, *ante*.

17. Where, by any decree or order, a deed is directed to be settled by the judge in chambers (*s*), in case the parties differ about the same, a summons to proceed shall be issued; and upon the return of such summons the party entitled to prepare such deed shall be directed to deliver a copy thereof, within such time as the judge shall think fit, to the party entitled to object thereto; and the party so entitled to object shall be directed to deliver to the other party a statement in writing of his objections (if any) within eight days after the delivery of such copy; and the proceeding shall be adjourned until after the expiration of the said period of eight days.

Rule 17. Settling deed under decree, &c., in case parties differ.

(*s*). As to the conveyancing counsel and settling deeds in chambers, see *ante*, p. 133, 134.

Where an infant is interested, the words "in case the parties differ," are omitted, *Calvert* v. *Godfrey*, 2 Beav. 267.

Conveyancing counsel.

Deeds relating to infants.

18. Where, upon the hearing of the summons to proceed it appears to the judge that by reason of absence, or for any other sufficient cause, the service of notice of the decree or order (*t*) upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service, or may, at his discretion, order any substituted service, or notice by advertisement or otherwise, in lieu of such service.

Rule 18. Service of notice of decree or order where dispensed with.

(*t*) See 15 & 16 Vict. c. 86, s. 42, and note thereto, *post*.

19. Where, in the prosecution of the decree or order, it appears to the judge that it would be expedient that further accounts should be taken or further inquiries made (*u*), he may order the same to be taken or made accordingly, or, if desired by any party, may direct the same to be considered in open Court (*v*).

Rule 19. Further accounts or inquiries.

Consideration in open Court.

(*u*) See now Ord. XXXIII. (*post*, pt. II.), providing that a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken.

Cons. Ord. XXXV. Proceedings in chambers.

(*v*) See s. 27 of the Act, p. 125, *ante*, and *Kelson* v. *Kelson*, there cited, but see *Delevante* v. *Childe*, 6 Jur. N. S. 118, and *Mutter* v. *Hudson*, 2 Jur. N. S. 34, where it was said that the inquiries need not be founded upon formal evidence adduced by the party desiring the enquiry; *sed quære*.

This rule does not empower the judge in chambers to direct accounts on a footing inconsistent with the decree for judgment itself, *Partington* v. *Reynolds*, 4 Drew. 253; *Nelson* v. *Booth*, 3 De G. & J. 119.

Where new evidence is tendered.

Inquiries must be consistent with decree.

Orders made in prosecution of a decree or judgment, may be varied under this section. *E. g.*, after a fund has been apportioned, a new claimant may come in; *Gillespie* v. *Alexander*, 3 Russ. 130; *Lashley* v. *Hogg*, 11 Ves. 602; *Montefiore* v. *Brown*, 7 H. L. Ca. 241; *Knierim* v. *Schmauss*, 10 W. R. 860; see note (*m*), p. 140, *ante*. So, too, an order directing the payment of costs out of a fund in Court, may be set right by making another fund primarily liable, *Sheppard* v. *Sheppard*, 33 Beav. 129.

Orders in pursuance of decree may be varied.

As to adjournment into Court generally, see note (*i*), p. 125, *ante*. Where one of two executors died before probate, but after doing acts which showed that he had accepted the office of executor, a question which had arisen as to whether he was, under such circumstances, indebted to the estate, was held to be rightly adjourned into Court under this rule (*Clark* v. *Phillips*, 2 W. R. 331).

Adjournment into Court.

Rule 20. Judge may nominate one solicitor for a class.

20. Where, upon the hearing of the summons to proceed, or at any time during the prosecution of the decree or order, it appears to the judge, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solicitor; and where the parties constituting such class cannot agree upon the solicitor to represent them, the judge may nominate such solicitor for the purpose of the proceedings before him; and where any one of the parties constituting such class declines to authorise the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the judge, with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated (*w*).

One set of costs where persons in same interest appear separately,

(*w*) Compare notes to Ord. XII. r. 7 (pt. II., *post*), as to more than one solicitor appearing for parties in the same interest.

Where a number of persons *in the same interest* having liberty to attend the proceedings in an administration suit appeared separately on an adjourned summons, only one set of costs was allowed, *Stevenson* v. *Abington*, 11 W. R. 936; *Bellew* v. *Bellew*, W. N. (1868) 253.

except where plaintiff and

Where the plaintiff and defendant in an administration suit employed

the same solicitor, other residuary legatees having liberty to attend the proceedings in chambers, were also allowed one set of costs between them, *Daubney* v. *Leake*, L. R. 1 Eq. 495; this principle is applied when the cause comes on for further consideration, *ibid.*; and see *Hubbard* v. *Latham*, 14 W. R. 553.

defendant employ same solicitors.

Rule 21. Judge may require distinct solicitor to represent parties.

21. Whenever, in any proceeding before a judge in chambers, the same solicitor is employed for two or more parties, such judge may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and adjourn such proceedings until such party is so represented.

Rule 22. Time for bringing in decree or order directing accounts or inquiries. Consequences of default.

22. Every decree or order directing accounts or inquiries to be taken or made (*x*) shall be brought into the judge's chambers by the party entitled to prosecute the same, within ten days after the same shall have been passed and entered; and in default thereof, any other party to the cause or matter shall be at liberty to bring in the same, and such party shall have the prosecution of such decree or order, unless the judge shall otherwise direct.

Rule 23. Consequences of default of receiver, or delay in prosecuting proceedings in chambers.

23. In case of default by any receiver (*x*) appointed by the Court in leaving or passing any account, or in making any payment, or in case any other proceeding pending at a judge's chambers is not prosecuted with due diligence, the parties, or any of them, may be required to attend at chambers at a time to be appointed for that purpose, to show cause why such account has not been left or passed, payment made, or other proceeding prosecuted; and thereupon such directions may be given at chambers or by adjournment in open Court as shall be proper to ensure the prosecution thereof by some person interested therein, and for the discharge of any receiver, and appointment of another, and for payment of the costs incurred by any neglect or default; or a certificate by the chief clerk of such neglect or default as aforesaid, or of any abandonment or abatement of the proceedings or otherwise, according to the facts, may be made and filed, without any fee being payable thereon; and after such certificate shall have been so made, unless the same shall be discharged, none of the parties shall be at liberty to further prosecute the proceeding at chambers, unless and until the Court or judge

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shall upon application make an order directing the same to be prosecuted; and upon such certificate becoming binding, any party may apply to the Court, and the Court may make such order relative to costs, and to relieve any party from the effect of any decree or order before made or proceeding taken which shall not have been duly prosecuted, or otherwise, as may be thought proper. And for the purposes aforesaid, any party, or the solicitor of the suitors' fund, may be directed to summon the persons whose attendance is required, and to conduct any proceedings (*y*), and carry out any directions which may be given; and the costs of the solicitor of the suitors' fund shall be paid by such parties or out of such funds as the Court or judge may direct; and if any costs of the solicitor of the suitors' fund be not otherwise paid, the same shall be paid out of the suitors' fund.

Receivers' accounts.

(*x*) See pages 168, 169, *post*, for Cons. Ord. XXIV., as to receivers' accounts.

Conduct of cause.

(*y*) See as to applying for the conduct of a cause on the plaintiff's delay, *Earle* v. *Sidebottom*, W. N. (1868) 121; *Butlin* v. *Arnold*, 1 H. & M. 715.

For three years.

Where a plaintiff obtained a decree giving him the right to prosecute inquiries in chambers, and produced no evidence to enable the Master to prosecute the inquiry for three years, on a certificate by the Master to that effect, an application by the plaintiff that he might be permitted to prosecute the inquiry was refused with costs, *James* v. *Gwynne*, 2 Jur. N. S. 436; and

For a year.

where a plaintiff neglected to prosecute the suit for a year, he had to pay the costs of the Master's report, *Ridley* v. *Tiplady*, 20 Beav. 44; see *Parkinson* v. *Lucas*, 28 Beav. 627, in which case a reference under the old

For ten years.

practice to the Master had not been prosecuted for ten years, and the Court transferred the reference to chambers, to be there disposed of at once, and intimated that if this was not done, it would be disposed of summarily.

Transferring conduct of suit.

When the plaintiff in the first of several suits has been guilty of negligence in prosecuting certain orders, the Court will give the conduct of such orders to the plaintiff in one of the other suits, though it will not take from the plaintiff in the first suits the conduct of the causes generally (*Vanderwell* v. *Vanderwell*, 1 L. T. N. S. 266).

Powers of party to whom carriage of suit is transferred.

The party to whom the carriage of the suit is transferred may inspect briefs, documents, &c., in the possession of the original plaintiff necessary to the carrying out of the suit (*Bennett* v. *Baxter*, 10 Sim. 417; and see further, *Smith* v. *Guy*, 2 C. P. C. 298).

As to carrying on a creditor's suit after the death of the plaintiff, see *Dixon* v. *Wyatt*, 4 Madd. 392.

Rule 24. Summons and Appointment Book.

24. At the time any summons or appointment is obtained, an entry thereof shall be made in "The Summons and Appointment Book," stating the date on which the summons is issued or the appointment made, the name of

the cause or matter, and by what party, and, shortly, for what purpose such summons or appointment is obtained, and at what time such summons is returnable, and for what time such appointment is made.

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25. List of matters appointed for each day shall be made out and affixed outside the doors of the chambers of the respective judges. And, subject to any special direction, such matters shall be heard in the order in which they appear in such lists.

Rule 25. Lists and order of hearing of matters at chambers.

26. The course of proceeding in chambers shall ordinarily be the same as the course of proceeding in court upon motions. No states of facts, charges, or discharges, shall be brought in. But when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements, shall be supplied for the use of the judge and his chief clerks, and, where so directed, copies shall be handed over to the other parties. But no copies shall be made of deeds or documents where the originals can be brought in, unless the judge shall otherwise direct (*z*).

Rule 26. Course of proceeding.

Copies.

(*z*) As to copies, &c., see 17 Judges' Regul., p. 1170, *post*, and Add Rules, Aug. 1875 (pt. II., *post*).

Copies.

27. The party intending to use any affidavit on any proceeding in chambers shall give notice to the other parties concerned of his intention in that behalf (*a*).

Rule 27. Notice of intention to use affidavit.

(*a*) Affidavits as to matters not *directly* in issue in the cause may be admitted in chambers, see 13 & 14 Vict. c. 35, s. 28, p. 118, *ante*, but evidence discovered after the original hearing, raising a new issue and a new defence, cannot be admitted upon the hearing upon further directions, but if justice cannot otherwise be done, the Court will direct an inquiry, see r. 19 and notes, pp. 143, 144, *ante*.

An undertaking not to use an affidavit at the hearing does not preclude its being used in an inquiry in chambers, *Jenner* v. *Morris*, 10 W. R. 640.

Affidavits used in chambers are open to cross-examination.

Affidavits in chambers as to new issues.

28. All affidavits which have been previously made and read in Court, upon any proceeding in a cause or matter, may be used before the judge in chambers.

Rule 28. Affidavits used in court may be used in chambers.

29. Where a *subpœna* is required for the attendance of a witness for the purpose of proceedings in chambers, such *subpœna* shall be issued from the Record and Writ Clerks' Office upon a note from the judge (*b*).

Rule 29. Subpœna for attendance of witness in chambers.

(*b*) See note (*o*), to 15 & 16 Vict. c. 80, s. 30, p. 127, *ante*.

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Subpœnas.

Rule 30. Practice on examination by the chief clerk. Winding-up cases.

30. Where a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding shall be the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case (*c*).

(*c*) See 15 & 16 Vict. c. 80, s. 30, p. 127, *ante*.

Rule 31. Filing of depositions before chief clerk.

31. The original examinations and depositions of parties and witnesses taken by or before the chief clerk, authenticated by his signature, shall be transmitted by him to the Record and Writ Clerks' Office, to be there filed; and any party to the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee.

Rule 32. Orders made in chambers how entered.

32. All orders made in chambers, and drawn up by the chief clerk or registrar, shall be entered in the same manner and in the same office as orders made in open court are entered (*d*).

(*d*) See s. 14 of the Act, p. 122, *ante:* care should be taken that no discrepancy exists between the summons and the order (*Rippin* v. *Dolman*, 2 W. R. 432); *Glover* v. *Ellison*, 20 W. R. 408; *M'Arthur* v. *Dudgeon*, L. R. 15 Eq. 102.

Rule 33. Accounts to be verified by affidavit numbered and left in chambers.

33. Where any account is directed to be taken, the accounting party, unless the judge shall otherwise direct, shall make out his account and verify the same by affidavit (*e*). The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit, and be left in the judge's chambers.

(*e*) The party making such affidavit is liable to cross-examination, p. 127, *ante*.

Rule 34. Surcharge.

34. Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner (*f*).

Cross-examination of

(*f*) Therefore an accounting defendant who files an affidavit verifying his account, if he is cross-examined on such affidavit, is entitled to notice of the

points on which he is to be cross-examined, *Re Lord*, L. R. 2 Eq. 605; *Wormsley* v. *Sturt*. 22 Beav. 398). See *Glover* v. *Ellison*, 20 W. R. 408; *McArthur* v. *Dudgeon*, L. R. 15 Eq. 102.

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35. Where an advertisement is required (*g*) for the purpose of any proceeding in chambers, a peremptory and only one shall be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed.

accounting party.

Rule 35. Advertisements.

(*g*) As to the advertisements required, see *Wood* v. *Weightman*, L. R. 13 Eq. 434, and compare the forms, p. 160, *post*.

36. The advertisement shall be prepared by the party prosecuting the decree or order, and submitted to the chief clerk for approval, and, when approved, shall be signed by him, and such signature shall be sufficient authority to the printer of the Gazette to insert the same.

Rule 36. By whom prepared.

Signature of chief clerk thereto.

37. Advertisements for *creditors or other claimants* (*h*) shall fix a time for the creditors or claimants to come in and prove their claims, and shall appoint a day for the hearing and adjudicating thereon, and may be in a form similar to the form set forth in the Schedule (L) (*i*), with such variations as the circumstances of the case may require.

Rule 37. Day for hearing claimants.

Form of advertisement.

(*h*) This rule, and the 38th, 41st, 42nd, and 43rd, are abrogated, so far as relates to creditors, by Order of 27 May, 1865, p. 157, *post*, which provides that creditors' claims may be ordered to be sent in to the *executor or administrator of the deceased* or such other person as the judge may direct, or his solicitor, and that they may be admitted without requiring further attendance or proof from the creditor.

Order May 27, 1865, as to *creditors*.

(*i*) See as to advertisements for creditors, r. 12, *ante*, and note, and forms, p. 160, *post*; and as to using in chambers advertisements previously issued by the executor, see *Cuthbert* v. *Wharmby*, W. N. (1869) 12.

38. *Claimants* (*k*) coming in pursuant to advertisement (*l*) shall enter their claims at the chambers of the judge in the "Claims Book," for the day appointed for hearing by the advertisement (*m*), and shall give notice thereof and of the affidavit filed to the solicitors in the cause, within the time specified in the advertisement for bringing in claims.

Rule 38. Claim Book. Notice of entering claims and affidavit.

(*k*) See note (*h*), *supra*, as to creditors who need not come into chambers if the executor admits their debts. See r. 2 of Order of 1865, p. 156, *post*.

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(*l*) As to coming in under an old decree, see *Ashley* v. *Ashley*, L. R. 1 C. D. 245.

The number of the entry of the claim must be stated in the notice, 9th Regul. as to business, Aug. 1857, *post*, p. 167.

(*m*) A claimant under these rules is a *quasi* party to the suit, *Bruff* v. *Cobbold*, 20 W. R. 284.

Rule 39. Office copies of affidavits.

39. The claimants filing affidavits shall not be required to take office copies; but the party prosecuting the cause or matter shall take office copies, and produce the same at the hearing, unless the judge shall otherwise direct.

Rule 40. Adjournment. Closing further evidence.

40. Where, on the day appointed for hearing the claims, any of them remain undisposed of, an adjournment day for hearing such claims shall be fixed (*n*); and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed; and directions may be given as to the mode in which such evidence is to be adduced.

(*n*) See further, as to the adjournment of cases in chambers, note (*o*) to r. 14, *ante*, p. 142.

Rule 41. Claims heard on adjournment day.

41. Any *claimant* (*o*) who has not before entered his claim may be heard on such adjournment day, provided he has entered his claim and filed his affidavits four clear days prior to such day, and no certificate of debts or claims has been made in the meantime.

(*o*) See as to creditors, note (*h*), *ante*, and r. 9 of the Order of 1865, p. 158, *post*.

Rule 42.

[The 42nd rule is abrogated, see note (*h*) *ante*.]

Rule 43. Claims excluded.

* See note (*h*) *supra*, as to creditors.

43. After the time fixed by the advertisement, no *claims** shall be received (except, as before provided, in case of an adjournment), unless the judge at chambers shall think fit to give special leave upon application made by summons (*p*), and then upon such terms and conditions as to costs and otherwise as the judge shall think fit.

Admitting further claims.

(*p*) See *Halliley* v. *Henderson*, 4 Jur. N. S. 202, and note (*m*) to r. 12 *ante*, p. 140.

Rule 44. Claims allowed.

44. A list of all claims allowed (*q*) shall, when required by the judge, be made out and left in the judge's chambers by the party prosecuting the decree or order.

(*q*) As to the costs of creditors coming in in chambers, see Cons. Ord. XL. r. 24, 25, which are as follows:

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24. *A creditor who has come in and established his debt in the judge's chambers, under a decree or order in a suit, shall be entitled to the cost of so establishing his debt; and the sum to be allowed for such costs shall be fixed by the judge, unless he shall think fit to direct the taxation thereof; and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established.*

Costs of creditors establishing claims. Cons. Ord. XL. Rule 24. Costs of establishing a debt under decree.

25. *Where an account consists in part of any bill of costs, or where the judge is authorised to fix the amount of costs under the 24th Rule of this Order, the judge may direct the taxing master to assist him in settling such costs, not being the ordinary costs of passing the account of a receiver; and the taxing master, on receiving such direction, shall proceed to tax such costs, and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing master by an order, and he shall return the same, with his opinion thereon to the judge by whose direction the same were taxed.*

Cons. Ord. XL. Rule 25. Taxation of costs under r. 24, by direction of a judge.

Three guineas was held a proper sum to allow, *Waterton* v. *Burt*, 39 L. J. Ch. 425.

Three guineas allowed.

The rules do not apply to the costs of a creditor plaintiff in the cause (*Flintoff* v. *Haynes*, 4 Hare, 309; and see further as to the rule, *Read* v. *Smith*, 4 Beav. 521).

Creditor plaintiff in cause not within rule.

Where there is a deficiency of assets the costs of the creditors proving will not be payable in the first instance, but will have to be apportioned with their debts (*Morshead* v. *Reynolds*, 21 Beav. 638).

And as to the costs of a creditor failing in a claim before the chief clerk, see *Hatch* v. *Searles*, 2 Sm. & G. 157; where it was held that the Court has jurisdiction to order them to be paid by the creditor, though he was originally not a party to the cause (cf. *Yeoman* v. *Haynes*, 24 Beav. 127); *Bentley* v. *Bentley*, 1 N. R. 390; and the Court ordered such unsuccessful claimant to pay the costs though an appeal was pending, *Colyer* v. *Colyer*, 10 W. R. 748.

Costs of creditors failing in claim.

The taxed costs of an abandoned summons will be ordered to be paid by the party taking it out (*Lister* v. *Bell*, 5 Jur. N. S. 115; and see *Tucker* v. *Herneman*, 24 L. J. Ch. 456).

45. Where the Court directs any computation of interest (*r*) or the apportionment of any fund which is to be acted upon by the Accountant-General* or other person without any further order from the Court, the decree or order made by the Court may direct such computation or

Rule 45. Interest and apportionment.

* Now Paymaster-General (35 & 36 Vict. c. 44, s. 4).

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apportionment to be made by one of the chief clerks attached to the court of the judge, and may direct the certificate thereof, signed by such chief clerk, to be acted upon accordingly, without the same being signed and adopted by the judge.

(*r*) See now as to orders directing interest, rr. 10, 14, 77 of Chancery Funds Rules, 1872, pt. II. *post.*

Cons. Ord. XLII. rr. 9-11.

Cons. Ord. XLII., rr. 9—11, provide as to interest on debts and legacies as follows :—

Rule 9. Interest on debts carrying interest.

9. *Where a decree or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest shall be computed on such debts, as to such of them as carry interest, after the rate they respectively carry, and as to all others, after the rate of four per cent. per annum, from the date of the decree or order.*

Rule 10. Interest on debts not carrying interest.

10. *A creditor, whose debt does not carry interest, who comes in and establishes the same before the judge in chambers, under a decree or order of the Court or of the judge in chambers, shall be entitled to interest upon his debt, at the rate of four per cent. per annum from the date of the decree or order out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.*

Rule 11. Interest on legacies.

11. *Where a decree or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of four per cent. per annum, from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will.*

Interest on arrears.

As to allowing interest on the *arrears* of an annuity which the testator in the suit had covenanted to pay, see *Jenkins* v. *Bryant*, 16 Sim. 272, and cases there cited, and *Lainson* v. *Lainson*, 18 Beav. 7 ; *Re Powell*, 10 Hare, 134. Interest will not in general be given from a period anterior to the decree, *Fowler* v. *Fowler*, 4 De G. & J. 250, 275.

Special rate of interest.

For cases where there has been a special order as to the rate of interest, see *Ex parte Lintott*, L. R. 4 Eq. 184, 188 ; *Barrow's* case, L. R. 3 Ch. 784 ; *Gruggen* v. *Cochrane*, 5 N. R. 457. Before these rules interest was not allowed, and it was held that a creditor in a suit which was instituted before the date of this rule, could not have the benefit of it though he did not come in until after the date of this rule, *Wheeler* v. *Gill*, L. R. 19 Eq. 316, and see *Davis* v. *Combermere*, 15 Sim. 394.

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Rule 46. Contents of certificate in cases of account.

46. Where an account is directed, the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify by the numbers attached to the items in the account, which, if any, of such items have been disallowed or varied, and shall state what additions, if any, have been made by way of surcharge. And where the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the party prosecuting the decree or order, and shall then be referred to by the certificate. The accounts, and the transcripts (if any), referred to by certificates, shall be filed therewith, but no copies thereof shall be required to be taken by any party.

Transcript.

Filing of accounts and transcripts.

Rule 47. Reference to decree or order, documents, or evidence.

47. The certificates to be made by the chief clerk to the judge shall not, except the special circumstances of the case shall render it necessary, set out the decree or order or any documents or evidence or reasons, but shall refer to the decree or order, documents, and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate is founded.

Rule 48. Form of chief clerk's certificate.

48. The certificate of the chief clerk to the judge may be in a form similar to the form (*s*) set forth in schedule (M), with such variations as the circumstances of the case may require; and, when prepared and settled, it shall be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and shall then be signed by the chief clerk at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the chief clerk, the same shall be then completed and signed by him without any adjournment.

Transcript.

(*s*) This schedule is omitted from this edition.

Rule 49. Time for taking opinion

49. The time within which any party is to be at liberty to take the opinion of the judge upon any proceeding

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of judge before certificate signed by him.

which shall have been concluded, but as to which the certificate of the chief clerk shall not have been signed and adopted by the judge, shall be four clear days after the certificate shall have been signed by the chief clerk (*t*).

(*t*) See sect. 33 of 15 & 16 Vict. c. 80, *ante*, p. 129, and notes thereto.

Rule 50. Summons for taking opinion of judge.

50. Any party desiring to take the opinion of the judge, as mentioned in the last preceding rule, shall, within four clear days after the certificate shall have been signed by the chief clerk, obtain a summons for such purpose.

Rule 51. Time for signature of certificate by judge.

51. At the expiration of four clear days after the certificate shall have been signed by the chief clerk, if no party has in the meantime obtained a summons to take the opinion of the judge thereon, the chief clerk shall submit the certificate to the judge for his approval, and the judge may thereupon, if he approve the same, sign such certificate in testimony of his adoption thereof, as follows:—"Approved, this day of ."

Rule 52. Time for applying to discharge or vary certificate signed.

52. The time within which an application may be made, by summons or motion, to discharge or vary any certificate which has been signed and adopted by the judge in chambers, shall be eight *clear* days (*u*) after the filing of such certificate (16th Oct. 1852; Ord. 51).

" Eight days.

(*u*) See 15 & 16 Vict. c. 80, s. 34, p. 129, *ante*, and notes thereto, as to the computation of these eight days.

Rule 53. Time for signature of certificate to be acted upon by Accountant-General without further order.

Time for applying to discharge or vary same when signed.

53. The 49th, 50th, 51st, and 52nd Rules of this Order shall not apply to certificates which are to be acted upon by the Accountant-General without any further order. Such certificates may be signed and adopted by the judge on the day after the same shall have been signed by the chief clerk, unless any party desiring to take the opinion of the judge thereon obtains a summons for that purpose before twelve o'clock on that day. And the time for applying to discharge or vary such certificates, when signed and adopted by the judge, shall be two clear days after the filing thereof.

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Rule 54. Certificates on passing receiver's accounts.

54. The 49th, 50th, 51st, and 52nd Rules of this Order shall not apply to certificates on passing receivers' accounts. Such certificates may be approved and signed by the judge without delay, and, upon being so signed, shall be filed and forthwith acted upon.

Rule 55. Filing of certificate and accounts.

55. The certificate when signed by the judge, with the accounts, if any, to be filed therewith, shall be transmitted by the chief clerk to the Report Office, to be there filed.

Rule 56. Filing of certificates requiring no signature by judge.

56. Certificates of the chief clerk, made as mentioned in the 45th rule, and not required to be signed and adopted by the judge, shall be transmitted and filed in the same manner as those signed and adopted by the judge.

Rule 57. Register of proceedings in chambers.

57. A register shall be kept of all proceedings in the judge's chambers, with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at every hearing.

Rule 58. Vacations.

58. Any judge of the Court whose chambers may be open for business during any vacation may issue summonses for the purpose of any proceeding before any other judge at chambers after the vacation.

Rule 59. In vacations certificates of chief clerk of another judge may be signed and adopted by any judge, and decree, &c., of one judge prosecuted in chambers of another judge.

59. In the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, any judge of the Court may sign and adopt any certificate made by the chief clerk or any other judge; and decrees or orders made by any judge of the Court may be prosecuted at the chambers of any other judge by his permission; and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the chambers of the same judge, if and so far as he shall think fit. In all cases in which any judge signs and adopts a certificate made in pursuance of a decree or order made by any other judge, it shall be expressed that he does so for such other judge; and such certificate shall in all future proceedings be deemed to be signed and

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adopted by the judge for whom it is signed and adopted, save that no application to discharge or vary such certificate shall be made to the judge for whom the same is signed and adopted, without the consent of the judge by whom it has been signed and adopted; and the judge by whom it has been signed and adopted shall have the same power to discharge or vary the certificate as he would have had if it had been made in pursuance of a decree or order made by himself.

Rule 60. Scandal.

60. If any party wishes to complain of any matter introduced into any statement, affidavit, or other proceeding before the judge in chambers, on the ground that it is scandalous (*x*), he shall be at liberty to take out a summons for the judge to examine such matter, and the judge may cause any such matter which he shall deem to be scandalous to be expunged.

(*x*) See as to scandal, note to Ord. XXVII. r. 1, pt. II. *post.*

Rule 61. Judge in chambers to have powers formerly exerciseable by Masters.

61. All other powers and authorities which at the time of the passing of the stat. 15 & 16 Vict. c. 80, were exerciseable by the Masters in Ordinary of the Court of Chancery, under or by virtue of any general order or orders of the Court, may be exercised by the judge in chambers.

Rule 62. Power of Court or judge to enlarge or abridge time and direct course of proceedings not to be affected.

62. The power of the Court and of the judge in chambers to enlarge or abridge the time for doing any act or taking any proceeding, and to give any special direction as to the course of proceeding in any cause or matter, shall not be affected by this order.

ORDER, 27TH MAY, 1865,

ADVERTISEMENT FOR CREDITORS (*a*).

27 May, 1865. Advertisements for Creditors.

Rule 1. Advertisements for creditors.

1. Every advertisement for creditors affecting the estate of a deceased person, which shall be issued pursuant to any decree or order, shall direct every creditor, by a time to be thereby limited, to send to the executor or administrator of the deceased, or to such other party as the judge shall direct, or to his solicitor, to be named and described in such advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement shall be in the form numbered (1) in the second schedule hereto, with such variations as the circumstances of the case may require; and at the time of directing such advertisement a time shall be fixed for adjudicating on the claims.

(*a*) This order was made in pursuance of the 30th sect. of Sir G. Turner's Act, p. 119, *ante;* and the 38th sect. of the Master in Chancery Abolition Act, p. 131, *ante.*

As to advertisements for claimants under administration decree generally, see Cons. Ord. XXXV. rr. 35—45, and note (*h*), p. 149, *ante.*

Rule 2. Creditor need not make affidavit or attend unless required.

2. No creditor need make any affidavit nor attend in support of his claim (except to produce his security) unless he is served with a notice requiring him to do so, as hereinafter provided.

Rule 3. Notice to creditor to produce security or other evidence.

3. Every creditor shall produce the security (if any) held by him, before the judge, at such time as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor shall, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the judge shall direct, produce all other deeds and documents necessary to substantiate his claim before the judge, at his chambers, at such time as shall be specified in such notice (*b*).

(*b*) As to disputing debts in chambers, and in particular the debt of the plaintiff creditor, see *Cardell* v. *Hawke*, L. R. 6 Eq. 464.

27 May, 1865. Advertisements for Creditors.

4. In case any creditor shall neglect or refuse to comply with the preceding Rule numbered (3), he shall not be allowed any costs (*c*) of proving his claim, unless the judge shall otherwise direct.

Rule 4. Creditor neglecting notice not to be allowed costs of proving.

(*c*) As to costs of proof, see note (*q*), p. 151, *ante*.

Rule 5. Claims to be examined and result verified by affidavit of executor or other person appointed by judge.

5. The executor or administrator of the deceased, or such other party as the judge shall direct, shall examine the claims sent in pursuant to the advertisement, and shall ascertain, so far as he is able, to which of such claims the estate of the deceased is justly liable; and he shall, at least seven clear days prior to the time appointed for adjudication, file an affidavit, to be made by such executor or administrator, or one of the executors or administrators, or such other party, either alone or jointly with his solicitor, or other competent person, or otherwise as the judge shall direct, verifying a list of the claims the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof respectively, are justly due and proper to be allowed, and the reasons for such belief.

Rule 6. Such affidavit may be postponed.

6. In case the judge shall think fit so to direct, the making of the affidavit referred to in the preceding Rule numbered (5), shall be postponed till after the day appointed for adjudication, and shall then be subject to such directions as the judge may give.

Rule 7. Adjudication on the claims.

7. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the judge may, in his discretion, allow any of the claims, or any part thereof respectively, without proof by the creditors, and direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence, relating thereto, as he may think fit, and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed shall be adjourned to a time to be then fixed.

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Rule 8. Notice to creditors of claims allowed or disallowed.

8. Notice shall be given by the executor or administrator, or such other party as the judge shall direct, to every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance, and to every such creditor as the judge shall direct, to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned; and in case any creditor shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed.

Rule 9. Sending in new claims before adjourned adjudication.

9. Any creditor who has not before sent in the particulars of his claim pursuant to the advertisement, may do so four clear days previous to any day to which the adjudication is adjourned.

Rule 10. Special leave to make other claims after time fixed by the advertisement.

10. After the time fixed by the advertisement, no claim shall be received (except as before provided in case of an adjournment), unless the judge shall think fit to give special leave upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall direct (*d*).

(*d*) See note (*m*) to Ord. XXXV. r. 12, p. 140, *ante*.

Rule 11. Reference to Cons. Ord. XXXV.

11. The Rules numbered 37, 38, 41, 42, and 43, of the 35th Consolidated General Order are hereby abrogated, in so far only as the same relate to creditors.

Rule 12. Notice to creditors of cheques being ready.

12. Where any decree or order is made for payments by the Accountant-General * to creditors, the party whose duty it is to prosecute such decree or order shall send to each such creditor, or his solicitor (if any), a notice that the cheques may be received from the Accountant-General;* and such party shall, when required, produce such decree or order, and any other papers necessary to enable such creditors to receive their cheques and get them passed.

* See marginal note, p. 35.

Rule 13. Notice by post sufficient.

13. Every notice by this Order required to be given, shall, unless the judge shall otherwise direct, be deemed

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sufficiently given and served if transmitted by the post, prepaid, to the creditor to be served, according to the address given by such creditor in the claim sent in by him pursuant to the advertisement, or, in case such creditor shall have employed a solicitor, to such solicitor, according to the address given by him.

Rule 14. Fees.

14. Solicitors shall be entitled to charge and be allowed the fees set forth and referred to in the first schedule to this Order, for business done under this Order.

Rule 15. Forms.

15. The forms set forth or referred to in the second schedule to this Order, with such variations as the circumstances of each case shall require, shall be adopted for the respective purposes therein mentioned.

Rule 16. Date.

16. This Order shall come into operation on and after the 15th day of June, 1865; and the General Interpretation Clause in the Consolidated General Orders shall be deemed to extend to this Order; and the word "Creditor" used in this Order, and in the forms subjoined hereto, shall include a person claiming any debt or liability affecting the personal estate of a deceased person, under any Order made pursuant to the statute 13th and 14th Victoria, chapter 35.

[The First Schedule provides what fees and charges shall be allowed to solicitors. See the new orders as to costs, pt. II., *post.*]

THE SECOND SCHEDULE.

FORMS.

No. 1. *Advertisement for Creditors.* [Rule 1.]

* Now Paymaster-General, 35 & 36 Vict. c. 44, s. 4.

Pursuant to a decree [*or*, an order] of the High Court of Chancery, made in [the matter of the estate of A. B., and in] a cause, S. against P., the creditors of A. B., late of , in the county of , who died

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in or about the month of , 18 , are, on or before the day of , 18 , to send by post, prepaid, to E. F., of , the solicitor of the defendant C. D., the executor [*or* administrator] of the deceased [*or as may be directed*], their Christian and surnames, addresses and descriptions, the full particulars of their claims, a statement of their accounts, and the nature of the securities (if any) held by them; or, in default thereof, they will be peremptorily excluded from the benefit of the said decree [*or* order]. Every creditor holding any security is to produce the same before the Master of the Rolls [*or*, Vice-Chancellor], at his chambers; situated at, *&c.*, on the day of , 18 , at o'clock in the noon, being the time appointed for adjudicating on the claims.

Dated this day of , 18 .

G. H.,
Chief Clerk.

No. 2. *Notice to Creditor to produce Documents.* [Rule 3.]

(*Short Title.*)

You are hereby required to produce, in support of the claim sent in by you against the estate of A. B., deceased [*describe any probate, administration, deed, or document required*], before the Master of the Rolls [*or*, Vice-Chancellor], at his chambers, situate at, *&c.*, on the , day of , 18 , at o'clock in the noon.

Dated this day of , 18 .

G. R., of &c., solicitor for plaintiff [*or* defendant, *or as may be*].

To Mr. S. T.

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No. 3. *Affidavit of Executor or Administrator as to Claims.*

[Rule 5.]

In Chancery.

(*Title.*)

We, C. D., of, &c., the above-named plaintiff [*or* defendant, *or as may be*], the executor [*or* administrator] of A. B., late of , in the county of , deceased, and E. F., of &c., solicitor, severally make oath and say as follows:

I, the said E. F., for myself say as follows:

1. I have in the paper writing now produced and shown to me, and marked A, set forth a list of all the claims the particulars of which have been sent in to me by persons claiming to be creditors of the said A. B., deceased, pursuant to the advertisement issued in that behalf, dated the day of , 18 .

And I, the said C. D., for myself say as follows:

2. I have examined the particulars of the several claims mentioned in the paper writing now produced and shown to me, and maked A, and I have compared the same with the books, accounts, and documents of the said A. B., [*or as may be, and state any other inquiries or investigations made*], in order to ascertain, so far as I am able, to which of such claims the estate of the said A. B. is justly liable.

3. From such examination (*and state any other reasons*), I am of opinion, and verily believe that the estate of the said A. B. is justly liable to the amounts set forth in the sixth column of the first part of the said paper writing marked A: and to the best of my knowledge and belief such several amounts are justly due from the estate of the said A. B., and proper to be allowed to the respective claimants named in the said schedule.

4. I am of opinion that the estate of the said A. B., is not justly liable to the claims set forth in the second part of the said paper writing marked A, and that the same ought not to be allowed without proof by the respective

claimants [*or*, I am not able to state whether the estate of the said A. B., is justly liable to the claims set forth in the second part of the said paper writing marked A, or whether such claims, or any parts thereof, are proper to be allowed without further evidence].

Sworn, &c.

No. 4. *Exhibit referred to in Affidavit No.* 3.

A.

(*Short Title.*)

List of claims the particulars of which have been sent in to E. F., the solicitor of the plaintiff [*or*, defendant, *or as may be*], by persons claiming to be creditors of A. B., deceased, pursuant to the advertisement issued in that behalf, dated the day of , 18 .

This paper writing marked A, was produced and shown to , and is the same as is referred to in his affidavit, sworn before me this day of , 18 .

W. B., &c.

First Part.—Claims proper to be allowed without further evidence.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Particulars of Claim.	Amount claimed.	Amount proper to be allowed.
				£ s. d.	£ s. d.

Second Part.—Claims which ought to be proved by the Claimants.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Particulars of Claim.	Amount Claimed.
				£ s. d.

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No. 5. *Notice to Creditor to prove his Claim.* [Rule 8.]

(*Short Title.*)

You are hereby required to prove the claim sent in by you against the estate of A. B., deceased. You are to file such affidavit as you may be advised in support of your claim, and give notice thereof to me, on or before the day of next; and to attend, by your solicitor, at the chambers of the Master of the Rolls [*or*, Vice-Chancellor], situate at, *&c.*, on the day of , 18 , at o'clock in the noon, being the time appointed for ajudicating on the claim.

Dated this day of , 18 .

G. R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be*].

To Mr. S. T.

No. 6. *Notice to Creditor of Allowance of Claim.* [Rule 8.]

(*Short Title.*)

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of £ , with interest thereon at £ per cent., per annum, from the day of , 18 , and £ for costs.

[*If part only allowed, add,* If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file, *&c., as in form No.* 5.]

Dated this day of , 18 .

G. R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be*].

To Mr. P. R.

No. 7. *Notice that Cheques may be received.* [Rule 12.]

(*Short Title.*)

The cheques for the amounts directed to be paid to the creditors of A. B., deceased by an order made in this

[matter and] cause, dated the day of 18 , may be received at the Accountant-General's Office on and after the day of , 18 .

G. R., of, &c., solicitor for the plaintiff [*or*, defendant, *or as may be*].

To Mr. W. S.,
&c.

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REGULATIONS AS TO BUSINESS IN CHAMBERS.

The following regulations as to business in chambers (not having the force of General Orders, see *Re Longstaffe*, 1 Dr. & Sm. 142), were issued on the 8th August, 1857, by order of Sir John Romilly, Sir R. T. Kindersley, Sir John Stuart, and Sir William Page Wood, Vice-Chancellors.

Regulations as to business. August 8, 1857.

I. SUMMONSES are not to be altered after they are sealed, except upon application at chambers, and any alterations then made will be marked with the seal of such chambers (*a*).

1. Summons in chambers.

(*a*) See p. 139, *ante*.

II. Upon application for time to answer (*b*) a printed copy of the bill,* and the interrogatories to be answered, are to be produced.

2. Applications for time to answer.

* Now statement of claim (if any) see Ord. XXI. r. 1 and note.

(*b*) See note to 15 & 16 Vict. c. 80, s. 26, p. 124, *ante*. And see Ord. XXXI. rr. 1—7 (pt. II.), *post*, as to interrogatories and answers thereto.

III. Whenever any matter is adjourned from the Court to chambers, or any directions are given in Court to be acted upon at chambers, whether upon a matter adjourned into Court from chambers or upon any other occasion, without an order being drawn up, a note signed by the registrar, stating for what purpose such matter is adjourned to chambers, or the directions given, is to be procured from the registrar, and left at chambers (*c*).

3. Registrar's note on adjournment to chambers.

(*c*) See notes to 15 & 16 Vict. c. 80, s. 27, p. 125, *ante*.

IV. In drawing up decrees and orders to be left at chambers, the solicitors are to take care that every account, inquiry, sale, direction to appoint receiver, and other direction to be answered at chambers, is numbered con-

4. Form of decree to be left at chambers.

Regulations as to business. August 8, 1857.

secutively according to the form set forth in the schedule (D) referred to in the General Consolidated Order XXIII. 15 (*d*), and that the other directions are not numbered.

(*d*) See note to Ord. XV. r. 1 (part II.), *post*.

5. How to be left.
* See Ord. XXI. r. 21 and note.

V. At the same time that any decree or order made in a suit instituted by bill * is left at chambers, a print of the bill is to be left.

6. Note of names of solicitors and parties.

VI. A note stating the names of the solicitors for all the parties, and showing for which of the parties such solicitors are concerned, is to be left at chambers with every decree or order.

7. Direction of judge as to serving notice of decree.

VII. For the purpose of procuring the direction of the judge as to the manner of serving notice of a decree or order (*e*), pursuant to the General Consolidated Order VII. 5, the plaintiff is to make an *ex parte* application by summons, and thereupon to show by affidavit as far as he is able :—

1. *With respect to Infants* :—

The ages of the infants.

Whether they have any parents or testamentary guardians or guardians appointed by the Court of Chancery.

Where and under whose care the infants are residing, at whose expense they are maintained, and in case they have no father or guardian, who are their nearest relations.

And that the parents, guardians, relations, or persons on whom it is proposed to serve the notice, have no interest in the matters in question, or if they have, the nature of such interest, and that it is not adverse to the interests of the infants.

2. *With respect to persons of Unsound Mind not found so by Inquisition* :—

Where and under whose care such persons are residing, and at whose expense they are maintained.

Who are their nearest relations, and that such relations, or persons upon whom it is proposed to serve the notice, have no interest in the matters in question, or if they have, the nature of such interest, and that it is not adverse to the interest of the persons of unsound mind.

Regulations as to business. August 8, 1857.

(*e*) See notes to 15 & 16 Vict. c. 86, s. 42, *post*.

VIII. A copy of every certificate by a record and writ clerk of his entry of a memorandum of service of notice of a decree or order, and of every order giving liberty to a person served with such notice to attend the proceedings, certified by the solicitor, is to be left at chambers (*f*).

8. Copy of certificate of entry, &c., to be left at chambers. Memorandum of service.

(*f*) See reference in note (*e*), *supra*.

IX. Upon the notice of a claim having been entered at chambers by a creditor or other claimant served upon the solicitors in the cause the number of the entry of the claim is to be stated (*g*).

9. Entry of claims in chambers.

(*g*) See Cons. Ord. XXXV. r. 38, p. 149, and Ord. 27th May, 1865, p. 156, *ante*.

X. Every alteration in an account verified by affidavit to be left at chambers is to be marked with the initials of the commissioner or officer before whom the affidavit is sworn, and such alterations are not to be made by erasures with the knife or other instrument.

10. Alterations in account verified by affidavit.

XI. Accounts, extracts from parish registers, particulars of creditors' debts, and other documents referred to by affidavit are not to be annexed to the affidavit, or referred to in the affidavit as annexed, but are to be referred to as exhibits.

11. Accounts, &c., to be referred to as exhibits.

XII. Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn, must have the short title of the cause or matter.

12. Exhibits.

XIII. Affidavits for the purpose of enabling the judge to fix reserved bids are to state the value of the property, by reference to an exhibit containing such value, so that the value may not be disclosed by the affidavit when filed (*h*).

13. Affidavits as to reserved biddings.

Regulations as to business. August 8, 1857.

XIV. As soon as particulars and conditions of sale settled at chambers have been printed, two prints thereof, certified by the solicitor to be correct prints of the particulars and conditions settled at the judge's chambers, are to be left at chambers (*h*).

14. Particulars and conditions of sale.

15. Affidavit of result of sale.

XV. An office copy of the affidavit of the person appointed to sell, of the result of the sale, with the bidding paper and particulars therein referred to, are to be left at chambers at least one clear day before the day appointed for settling the certificate of the result of the sale (*h*).

(*h*) See notes to Cons. Ord. XXXV. r. 13, p. 141, *ante*.

16. Time for receivers to deliver their accounts.

XVI. Receivers' accounts are to be delivered at chambers on or before the day appointed for that purpose, and in default the receiver will be liable to the consequences imposed by the General Consolidated Order XXIV. 2 (*i*).

(*i*) See as to default of receivers, Cons. Ord. XXXV. r. 23, p. 145, *ante*. The provisions of Cons. Ord. XXIV., as to receivers, here referred to, are as follows:—

Cons. Ord. XXIV. Receivers' accounts.

Rule 1. Receiver to give security.

1. *Where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed shall first give security, to be allowed by the judge to whose Court the cause is attached, and taken before a person authorised to administer oaths in Chancery, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as such judge shall appoint, and to account for and pay the same as the Court shall direct, or, as the case may be, to be answerable for what he shall receive in respect of the personal estate for the getting in and collection of which he is to be appointed, and to account for and pay the same as the Court shall direct. And the person so to be appointed shall be allowed a proper salary for his care and pains in receiving such rents and profits, or, as the case may be, shall have an allowance* made to him in respect of his collecting such personal estate.*

* See note next page.

Rule 2. Days for receivers to leave and pass ac-

2. *The judge shall fix the days upon which receivers shall (annually, or at longer or shorter periods at his discretion) leave and pass their accounts and also the*

Regulations as to business. August 8, 1857.

days upon which such receivers shall pay the balances appearing due on the accounts so left, or such part thereof as the chief clerk shall certify as proper to be paid by them. And with respect to such receivers as shall neglect to leave and pass their accounts and pay the balances thereof at the times so to be fixed for that purpose as aforesaid, the judge before whom such receivers are to account shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such receivers, but also charge them with interest after the rate of 5l. per cent. per annum, upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers.

counts and pay balances.

Penalties of neglect.

Rule 3. Summons to proceed upon receiver's account (see p. 154, *ante*, r. 54.)

3. *Upon a receiver's account being left in the judge's chambers to be passed, a summons to proceed thereon shall be taken out; and the account, when passed, shall be entered by the solicitor of the receiver in books, in the same manner as heretofore; and the affidavit verifying the account so passed shall refer to it as an exhibit, and not be annexed to it.*

Rule 4. Deposit of account book.

4. *When a receivership has been completed, the book containing the accounts shall be deposited in the Office of the Clerks of Records and Writs.*

Salary and allowances of receivers.

The receiver's allowance depends on the degree of difficulty or facility with which the rents are collected (*Day* v. *Croft*, 2 Beav. 488). The *maximum* allowance is usually 5*l.* per cent. (Seton, 1006). But for extraordinary trouble and expenses an additional allowance may, by express order, be made (*Potts* v. *Leighton*, 15 Ves. 276; *Re Ormsby*, 1 B. & B. 189; *Malcolm* v. *O'Callaghan*, 3 M. & Cr. 52, cited in Seton, 1006).

Recognizances.

The security usually required is the recognizance of the receiver, together with two sureties for double the amount of the annual income (Seton, 1007; *Mead* v. *Lord Orrery*, 3 Atk. 237). In certain cases a receiver may be appointed on his own recognizances only (*Wilson* v. *Wilson*, 11 Jur. 793), and in some cases without recognizances (see *Bainbrigge* v. *Blair*, 3 Beav. 424; *Manners* v. *Furze*, 11 Beav. 30, and other cases cited in Seton, l. c.). If parties not competent to consent are interested, security must always be given (*Tylee* v. *Tylee*, 17 Beav. 583).

When dispensed with.

Who may be sureties.

The sureties must be persons resident in England, even where the property to be collected lies out of the country (*Cockburn* v. *Raphael*, 2 S. & S. 453). The sureties are liable for interest as well as the receiver (*Dawson* v. *Raynes*, 2 Russ. 466), and for costs of proceedings against receiver, and to appoint a new one (*Ex parte Mansell*, 3 J. & Lat. 351; and see *Re Lockey*, 2 Ph. 509). As to the surety's lien on the receiver's property, see *Brandon* v. *Brandon*, 7 W. R. 250.

Their liability.

Their lien.

Regulations as to business. August 8, 1857.

As to the jurisdiction over defaulting receivers, see *Bristowe* v. *Needham*, 11 W. R. 926; *Brandon* v. *Brandon*, 1 Dr. & Sm. 16; *Dixon* v. *Wilkinson*, 4 Drew. 614, 4 De G. & J. 508.

Receiver when charged with interest.

A receiver who keeps money in his hands even for a quarter of a year after it ought to have been paid in, will be charged with interest (*Fletcher* v. *Dodd*, 1 Ves. jun. 85). Interest may be charged though the accounts have been settled (*Hicks* v. *Hicks*, 3 Atk. 274; *Fletcher* v. *Dodd*, *ubi sup.*); and even though the receiver has been discharged (*Harrison* v. *Boydell*, 6 Sim. 211, where the receiver having failed to pay in his balance was ordered to pay the same and the amount allowed for his salary with interest).

Under the old practice it was held that, unless the objection to the allowance of poundage to the receiver was raised before the Master, the Court would not enter into it (*Ward* v. *Swift*, 8 Hare, 139).

Rate of interest.

Where the default was made by the *executors* of a receiver (see *Ludgator* v. *Channell*, 3 M. & G. 175), it was held by V.-C. Knight Bruce that they ought only to be charged with interest at 4*l.* per cent. (*Clements* v. *Beresford*, 10 Jur. 771).

Not allowed to make interest on balances in his hands.

A receiver being in the position of a *quasi* trustee, will not be allowed to make interest on the balance in his hands (*Shaw* v. *Rhodes*, 2 Russ. 529; and see *Drever* v. *Maudsley*, 8 Jur. 547; *Earl of Lonsdale* v. *Church*, 3 B. C. C. 41); and will be answerable for the loss of monies with the control of which he has parted, *ex. gr.*, monies deposited in a bank in the name of his sureties (*Salway* v. *Salway*, 2 Russ. & M. 215; on appeal to the House of Lords, 9 Bligh, N. S. 181, sub. nom. *White* v. *Baugh*). So if he remits the money to his own credit at his banker's, and the banker fails (*Wren* v. *Kirton*, 11 Ves. 377). So if he places it in what he knows to be improper hands (*Knight* v. *Lord Plymouth*, 3 Atk. 480). *Secus*, if the money be paid to a person apparently solvent at the time for the purpose of its safe transmission (*ibid.*) or for safe custody (see 3 Ves. 566, and *Salway* v. *Salway*, 4 Russ. 60).

For what losses answerable.

17. Accounts how to be written.

XVII. All accounts, copies (*j*) and papers, left at chambers, are to be written upon foolscap paper bookwise, unless the nature of the document renders it impracticable to do so.

(*j*) See now Additional Orders, August, 1875 (pt. II.), *post*, as to printed copies.

18. Adjournment of cause in chambers.

XVIII. Where any cause originating in chambers shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration (*k*), such cause may, after the expiration of eight days, and within fourteen days from the filing of the certificate of the chief clerk of the judge to whose Court the cause is attached, be brought on for further consideration by a summons to be taken out by the plaintiff or party having the conduct of the cause, and after the expiration of such fourteen days, by a summons to be taken out by any other party. And such summons is to be in the form prescribed by the Consolidated Order XXXV. 2, and set forth in the Schedule (K) thereto; and the object of the application may be

stated as follows:—"That this cause, the further consideration whereof was adjourned by the Order of the day of , 18 , may be further considered." Regulations as to business. August 8, 1857.

This summons is to be served six clear days before the return.

(*k*) See note (*o*), p. 142, *ante*. See Cons. Ord. XXI. r. 10, cited in notes to Ord. XXXVI., *post* (pt. II.), as to further consideration. Further consideration.

XIX. Upon application for the appointment of guardians of infants and allowance for maintenance (*l*), the evidence is to show:— 19. Evidence on application for guardian and maintenance.

1. The ages of the infants.
2. The nature and amount of the infants' fortunes and incomes.
3. What relations the infants have.

(*l*) See note (*g*), p. 123, *ante*.

XX. Upon applications to obtain the sanction of the Court to infants making settlements on marriage, under the Act of 18 & 19 Vict. cap. 43 (*m*), evidence is to be produced to show:— 20. Evidence on application under Infants' Settlement Act.

1. The age of the infant.
2. Whether the infant has any parents or guardians.
3. With whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has.
4. The rank and position in life of the infant and parents.
5. What the infant's property and fortune consist of.
6. The age, rank, and position in life of the person to whom the infant is about to be married.
7. What property, fortune, and income such person has.
8. The fitness of the proposed trustees and their consent to act.

The proposals for the settlement of the property of the infant, and of the person to whom such infant is proposed to be married, are to be submitted to the judge.

(*m*) See this Act, *post*, p. 212.

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XXI. For the purpose of procuring the appointment of a guardian to infants under the Act of Parliament of 19 & 20 Vict. c. 120, and the Consolidated General Order XLI. 23 (*n*)—

21. Appointment of guardians under Settled Estates Acts.

A summons should be taken out in the names of the infants by a next friend, in the form used for originating proceedings in chambers, intituled in the same manner as the petition or intended petition,—that , or some other proper person or persons, may be appointed guardian or guardians of the said infants, for the purpose of making an application on behalf of the said infants [*or*, consenting on behalf of the said infants to an application] to the Court under the provisions of the above Act. In case the application to the Court is to be made on behalf of the infants, the guardian must be appointed before the petition is presented (*n*). If the guardian is to consent to an application, the guardian may be appointed either before or after the petition is presented.

Upon the application to appoint such guardian, the following evidence is to be adduced:—

1. The age of the infant.
2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery.
3. Where and under whose care the infant is residing, and at whose expense he is maintained.
4. In what way the proposed guardian is connected with the infant, and why proposed, and how qualified to be appointed.
5. That the proposed guardian has no interest in the intended application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant.
6. The consent of the guardian to act.
7. The nature of the intended application to the Court.

(*n*) See the Settled Estates Acts and the Cons. Order under them, pp. 214–242, *post*.

Direction as to application on behalf of

XXII. For the purpose of procuring the direction of the judge for leave to make or consent to an application on

Regulations as to business. August 8, 1857.

behalf of infants or lunatics under the said Act of 19 & 20 Vict. c. 120, and the Consolidated General Order XLI. 23 (*a*), a summons is to be taken out after the petition is presented in the ordinary form, intituled in the same manner as the petition, by the guardian of the infant or committee of the lunatic, that he may be at liberty on behalf of the infant or lunatic to make the application [*or*, consent to the application] to the Court proposed to be made by the petition presented to the Lord Chancellor [*or* Master of the Rolls] on the day of .

infants, &c., under Settled Estates Acts.

Upon this application the guardian or committee should make an affidavit that he believes it to be proper and for the benefit of the infant or lunatic that the application proposed to be made should be made [or consented to] on behalf of the said infant or lunatic, and such other evidence, if any should be adduced, as the circumstances of the case may require, to show the propriety of the application so far as the infant or lunatic is concerned, and the petition should be produced.

(*o*) See note (*n*), *supra*.

23. Procuring directions of judge as to advertisements under Settled Estates Act.

XXIII. For the purpose of procuring the directions of the judge pursuant to the General Order. XLI. 16 (*p*), a summons is to be taken out after the petition has been answered, intituled in the same manner as the petition, that directions may be given in what newspapers the notices required by the Act are to be inserted.

The petition is to be produced on the return of the summons, and the judge's direction will be written on the petition and signed by his chief clerk.

(*p*) See note (*n*), *supra*.

24. Variation of forms

XXIV. The forms set forth in the schedule hereto are to be adhered to, and only to be varied in so far as may be necessary to meet the circumstances of the case.

JOHN ROMILLY, M. R.
RICHARD T. KINDERSLEY, V.-C.
JOHN STUART, V.-C.
W. P. WOOD, V.-C.

Regulations as to business. August 8, 1857.

[The schedule contains forms of affidavits, of service of summons, of affidavits as to production of documents (see now Appendix of Forms, *post*), forms of accounts and of affidavits verifying accounts, of conditions of sale, of affidavits verifying result of sale, of lists of debts annuities and legacies; of receivers' recognizances and accounts, of affidavits verifying abstracts and engrossments of deeds.]

CHANCERY PROCEDURE ACT, 1852.

15 & 16 VICT., CHAP. 86.

An Act to amend the Practice and Course of Proceeding of the High Court of Chancery.

15 & 16 Vict. c. 86, ss. 1–10.

[Sections I.—X. provided for the filing of printed bills of complaint, for which the writ of summons and statement of claim * are now substituted.]

* See orders II. and XXI. *post*.

Written authority of next friend or relation.

When to be filed.

XI. Before the name of any person shall be used in any suit to be instituted in the said Court as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority (*a*) to the solicitor for that purpose; and such authority shall be filed with the bill, information, or claim.

Written authority dispensed with.

Costs where no sanction

(*a*) See *A.-G.* v. *Wiltshire*, 45 L. J. Ch. 53; *A.-G.* v. *Murray*, 13 W. R. 85, where the filing of the written authority with the bill was dispensed with under special circumstances.

A bill improperly filed without the client's sanction was ordered to be taken off the file with costs to be paid by the solicitor, *Jardine* v. *Bright*, 10 W. R. 380, see *Re Thompson*, 25 Beav. 245; *Fenton* v. *Queen's Ferry Coy.*, L. R. 7 Eq. 267; *Robson* v. *Dodds*, L. R. 8 Eq. 338; *Thomas* v. *Finlayson*, 19 W. R. 255.

Interrogatories.

[Section XII. relates to interrogatories by plaintiff for examination of defendant (see now Ord. XXXI. *post*).]

Answer.

[Sections XIII. and XIV. relate to answers (including what is now the statement of defence, Ord. XXII. *post*, and the answer to interrogatories, Ord. XXXI. 7, *post*).]

Motions for decree.

[Sections XV. and XVI. introduced the practice of motion for decree, now disused; but compare Ord. XL., *post*, as to motion for judgment.]

Impertinence.

[Section XVII. abolished exceptions for impertinence; but the costs occasioned by the introduction of any impertinent matter were to be paid by the party introducing the same on application being made to the Court for that purpose (see note to Ord. XIX. 3, *post*).]

Discovery of documents.

[Sections XVIII.—XX. gave plaintiff or defendant power to call for affidavit as to documents, and empowered the defendant to interrogate the plaintiff (see now Ord. XXXI. *post*).]

[Section XXI. abolished commissions to take answers.]

Affidavits, &c., how to be

XXII. All pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations, and attestations of

honour in causes or matters depending in the High Court of Chancery,* and also acknowledgments required for the purpose of enrolling any deed in the said Court, shall and may be sworn and taken in Scotland or Ireland, or the Channel Islands (*b*), or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, Court, notary public, or person lawfully authorized to administer oaths (*c*) in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature (*d*), as the case may be, of any such Court, judge, notary public, person, consul, or vice-consul attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents (*e*) to be used in the said Court.

15 & 16 Vict. c. 86, s. 22.

sworn in colonies, &c.

* See marginal note, p. 2.

(*b*) As to the Isle of Man, see 16 & 17 Vict. c. 78, s. 6, *post*.

(*c*) (A.) Under this section, when affidavits in the colonies and within Her Majesty's dominions are sworn before the judges, Courts, and persons mentioned in the text, no verification of their signature is necessary (*Hayward* v. *Stephens*, 36 L. J. Ch. 135), because the Court is directed to take judicial notice of such signature. See note (*i*), *infra*.

Affidavits sworn in the colonies;

(B.) Affidavits in foreign countries not forming part of Her Majesty's dominions may be sworn in two ways—

in foreign countries;

(1.) Under the section, before the resident consul or vice-consul, and judicial notice will be taken of his authority and official seal without formal verification: compare the cases in which such official seal is taken in proof of the qualification of a notary public, &c.,—*e.g.*, *Haggitt* v. *Iniff*, 5 D. M. G. 910; and see *Ferguson* v. *Benyon*, 16 W. R. 71; *Bateman* v. *Cook*, 3 D. M. G. 39.

before consul;

(2.) Though the most regular course is now to have the affidavit sworn before the consul, it is settled that there is nothing to prevent its being sworn, if more convenient, according to the former practice, irrespectively of the section—viz., before notaries public, or before persons duly authorised *by the law of the foreign country* to administer oaths there: *Levitt* v. *Levitt*, 2 H. & M. 626; *Haggitt* v. *Iniff*, *ubi sup.*; *Stanford* v. *Lloyd*, 15 W. R. Ch. Dig. 104; *Re Kenah*, 15 W. R. 781; but when affidavits are thus sworn the Court is not authorised to take judicial notice of such person's authority and signature, but will require proper proof of both: *Baillie* v. *Jackson*, 3 D. M. G. 38; *Re Earl*, 4 K. & J. 300; *Re Davis*, L. R. 8 Eq. 98. A certificate of the clerk of a superior court of New York was held sufficient verification in *Levitt* v. *Levitt* (*ubi sup.*), *Alexander* v. *Nurse*, W. N. (1871) 249; and where the fund was small such verification of signature was dispensed with: *Mayne* v. *Butter*, 13 W. R. 128; and so where the suit was uncontested: *Lees* v. *Lees*, W. N. (1868) 268; see *Smith* v. *Davies*, 17 W. R. 69; *Lyle* v. *Elwood*, L. R. 15 Eq. 67, where a written consent was given; *Whiting* v. *Bassett*, L. R. 14 Eq. 70, where a declaration having been made

before notary public.

15 & 16 Vict. c. 86, s. 22.

before a notary public abroad, the declarant's signatures were allowed to be verified by an affidavit in the cause.

It only remains to note one or two exceptional cases in which neither of the above-mentioned methods was adopted—viz., *Drevon* v. *Drevon*, 12 W. R. 66, where the person desiring to make an affidavit lived a hundred miles from any resident consul, and there was great difficulty in swearing it before any notary public, and the Court appointed a resident solicitor special examiner to take the evidence; and *Re Scriven*, 16 W. R. Ch. Dig. 105, where affidavits made in the state of Missouri, U.S., attested by the governor as being sealed with the great seal of the state, were admitted, there being no resident consul.

Signature of person authorised to administer oath.

(*d*) It must be remembered, that the fact of a consul or other duly authorised person's signature being attached to a document does not make the document itself receivable in evidence, the Court being only bound to take judicial notice of the seal or signature (*Re Forbes*, 1 W. R. 32; see *Re Goss*, 12 Jur. 595).

(*e*) These general words were held to include a power of attorney, *Armstrong* v. *Stockham*, 11 Jur. 97.

[Sections XXIII., XXIV. provide penalties for falsely swearing, attesting before any person authorised by this Act to administer oaths, or for forging signature or seal of such person.]

[Section XXV. dispensed with the oath of a messenger on the filing answers, &c.]

Joining issue.

[Section XXVI. provided for the joining issue by filing replication (see now Ord. XXIV., *post*, pt. II.).]

Motion to dismiss.

[Section XXVII. related to motions to dismiss for want of prosecution (see now Ord. XXIX., *post*, pt. II.).]

Examination before examiners.

[Sections XXVIII.—XL. related to the mode of examining witnesses, and the practice before special examiners. The evidence *at the hearing* of actions is generally to be taken in open Court, but evidence on interlocutory applications, and in other cases by agreement between the parties, *e.g.*, on motions for judgment when heard "short," may be taken by affidavit, and in such cases the depositions of unwilling witnesses, and the cross-examination of persons who have made affidavits will be taken before the examiners as before; also under Ord. XXXVII. rr. 1, 4 (pt. II.), the Court may order the examination of any witness, and the same power is given to the Appeal Court by Ord. LVIII. r. 5 (pt. II.). The following sections seem to be still applicable.]

Witnesses to be examined by one of the examiners of the Court in the presence of the parties.

XXXI. All witnesses to be examined orally under the provisions of this Act shall be so examined by or before one of the examiners of the Court (*g*), or by or before an examiner to be specially appointed by the Court (*h*), the examiner being furnished by the plaintiff with a copy of the bill and of the answer,* if any, in the cause; and such examination shall take place in the presence of the parties (*i*), their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination, and re-examination shall be conducted as nearly as may be in the mode now in use in courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause (*j*).

* See now Orders II., XXI., XXXI.

(*g*) This examination usually takes place at the Examiners' Office. A witness, by appearing, waives any irregularity in the process of requiring his attendance, *Lawton* v. *Price*, 16 W. R. 666. 15 & 16 Vict. c. 86, s. 31.

It seems that witnesses who have waited at the examiners' office for half an hour without receiving any notice that it is intended to proceed with the examination, may leave with impunity, *Perks* v. *Stottart*, 1 N. R. 563. Place of examination. Attendance of witnesses.

A deposit of 3*l.* must be made on obtaining an appointment with an examiner of the court, Order 1 Jan. 1862; but this does not apply to persons suing in *formâ pauperis*, *Skeats* v. *Hurst*, 1 N. R. 50. Ord. 1 Jan. 1862.

(*h*) A special examiner has sometimes been appointed in the case of witnesses residing more than twenty miles from London, *Pillan* v. *Thompson*, 10 Hare, App. lxxvi.; *Reed* v. *Prest*, Kay, App. xiv.; *Ogilby* v. *Gregory*, 4 W. R. 67. But in *Brocas* v. *Lloyd*, 21 Beav. 520, approved by the Lords Justices in *Altree* v. *Sherwin*, 2 De G. & J. 92, the Master of the Rolls expressed great disinclination to appoint a special examiner, even when the witnesses resided in the country, on account of the great expense entailed on the parties by that means. In *Re Forster's Trusts*, 2 W. R. 679, V.-C. Kindersley ordered the examination and cross-examination of witnesses generally to take place in the country, on the assumption that it should apply to witnesses on both sides. It seems that the witness desiring to be examined by a special examiner should call on the party on whose behalf he made his affidavit to apply for the special examiner, *Townsend* v. *Williams*, 6 W. R. 734. Special examiner. Special examiner only on special reason.

The Court may appoint an examiner for the examination of witnesses residing out of the jurisdiction (*Crofts* v. *Middleton*, 9 Hare, App. xviii.); and see *Campbell* v. *The Attorney-General*, 2 L. R. Ch. 571, for the jurisdiction of the Scotch Courts, under the Evidence by Commission Act, 22 Vict. c. 20, over questions of privileged documents, &c., where an examination before a special examiner appointed by the Court of Chancery, takes place within the jurisdiction of the Scotch Courts. As to the form of order in such cases, vid. 9 Hare, App. lxxv. The Court, however, will exercise a discretion in such cases, and will not make the order when no new facts are likely to be elicited (*Lord* v. *Colvin*, 2 W. R. 134). Witnesses out of jurisdiction. Special examiner.

A motion for an order to compel a witness, who had gone to Paris, to return to this country for the purpose of being cross-examined on his affidavits, was refused with costs, *Wellesley* v. *Mornington*, 5 W. R. 393; *Edwards* v. *Spaight*, 2 J. & H. 617. In such a case the proper course would have been to have applied for a special examiner, *Rawlins* v. *Wickham*, 4 Jur. N. S. 990.

As to the appointment of a special examiner for an examination which the regular examiners have no time to take, see *Brennan* v. *Preston*, 10 Hare, App. xvii.; *Re Smith, Knight, & Co.*, L. R. 8 Eq. 23, where *Davenport* v. *Goldberg*, 2 H. & M. 286, is considered.

The following Rules of the Order 5 Feb. 1861, relate to the examination of persons who cannot come to the office :—

11. *Notwithstanding any of these rules, the Court, or the judge in chambers, may direct that the oral examination and cross-examination of any witness (whether a party or not), or the cross-examination of any person who has been examined ex parte before an examiner, or made an affidavit, shall be taken before an examiner of the Court or a special examiner in the manner prescribed by the statute* 15 *&* 16 *Vict. c.* 86, *as if these rules had not been made, in case it shall appear to the judge that owing to* Ord. 5 Feb. 1861. Rule 11. Examination of witnesses who are old, infirm, &c.

15 & 16 Vict. c. 86, s. 31.

the age, infirmity, or absence out of the jurisdiction of such witness or person, or for any other cause which to the judge shall appear sufficient, it is expedient that such direction should be given. Such direction may be obtained on application to the Court or the judge in chambers on notice.

Rule 12. Attendance of examiner in such case.

12. *In the case of the examination or cross-examination, under the last preceding rule, of any person in England or Wales, the party requiring such examination or cross-examination may apply to the Court or the judge in chambers for an Order that one of the Examiners of the Court may attend, for the purpose of such examination or cross-examination, at any place or places in England or Wales to be named in such order.*

Rule 13. Expenses of examiner.

13. *The examiner shall, in respect of expenses incident to the performance of his duty under such order as mentioned in the last preceding rule, be entitled to receive, on the production to him of such order, such sums of money as are mentioned in the schedule hereto. Such sums shall be paid to him by the party obtaining such order; and, subject to any direction of the Court, or of the judge in chambers to the contrary, shall be costs in the cause.*

SCHEDULE.

Expenses to be allowed to an Examiner of the Court when acting under any such Order as mentioned in the 12th of the above rules.

	£	s.	d.
For every day in which he is necessarily, and without any default of his own, detained in the performance of such duty, for his expenses, the sum of	1	1	0
For every mile he travels from the Examiners' Office to the place of examination, and from one of the places of examination or cross-examination (if more than one) to another of them, and from the place where he last acts in such examination or cross-examination to the Examiners' Office, the sum of . . .	0	1	6

Application for special examiner.

The application for a special examiner may be made in chambers (*Reed* v. *Prest*, Kay, App. xiv.; and see *Williams* v. *Williams*, 10 Hare, App. xlv.).

The witness can have no voice in the appointment of the examiner, *Re Contract Corporation*, L. R. 13 Eq. 27.

Who may be.

It is not imperative that a special examiner should be a barrister (*Henderson* v. *Philipson*, 17 Jur. 615). But in cases of difficulty it seems a barrister ought to be appointed (*Reed* v. *Prest*, *ubi sup.*).

Fees.

The fee of a special examiner is five guineas a day, and five shillings for his clerk, and he is not entitled to any further fee for the labour of reading over papers, or other extra labour (*Payne* v. *Little*, 21 Beav. 65). But he may be

allowed the expense of hiring a room, *Wright* v. *Larmuth*, L. R. 10 Eq. 139. 15 & 16 Vict. c. 86, s. 31.

(*i*) Where a defendant had given notice to read a co-defendant's evidence, notice of cross-examination of such co-defendant had to be given to the defendant who had thus made him his witness, *Pennell* v. *Davison*, 14 W. R. 174.

(*j*) It seems that professional witnesses, even though residing within the bills of mortality, may require compensation before giving evidence (*Clark* v. *Gill*, 1 K. & J. 19). The scale of allowance in such a case does not depend on a witness's valuation of his own time, but consists of a fixed payment corresponding with that allowed in courts of common law (*Nokes* v. *Gibbon*, 3 Jur. N. L. 282; *Turner* v. *Turner*, 7 W. R. 573). A witness may demand to have his travelling expenses paid before attending to be examined (*Brocas* v. *Lloyd*, 23 Beav. 129); and when brought up to be examined he may insist, before giving evidence, on being paid for his loss of time, *Wiltshire* v. *Marshall*, 1 W. N. (1866), 80; and the rule applies to parties to suits as well as to other witnesses (*Davey* v. *Durrant*, 24 Beav. 493). Expenses of witnesses.

A witness may be examined twice over, *Wood* v. *Scarth*, 24 L. J. Ch. 392; and see *Lord* v. *Colvin*, 3 Drew. 222, where it was held that a defendant may cross-examine his co-defendant's witnesses, for the evidence in a suit put in by any party is *primâ facie* evidence against all parties to it; (*Sturgis* v. *Morse*, 26 Beav. 562; *Laurence* v. *Maule*, 4 Drew, 473, 484; *Powys* v. *Blagrove*, Kay, 495); but *cross-examination* of a defendant is not necessarily evidence against co-defendants, *Rehden* v. *Wesley*, 26 Beav. 432. Several examinations. Cross-examination by defendant.

See next section as to the power of the examiner to decide upon the relevancy of evidence.

In cross-examination upon an account notice of items to which the cross-examination will be directed must be given to the party bringing in the account, whether such party be an accounting or a charging party, *Bates* v. *Eley*, L. R. 1 Ch. Div. 473, see p. 148, note (*f*), *ante*. Cross-examination upon an account.

As to the order of cross-examination where there are several cross-examining parties, see *Harrison* v. *Mayor of Southampton*, 2 Jur. N. S. 435.

On the examination of witnesses under this section, it was held that if a document is put into the hands of a witness by the party examining him, the other side may not require to see the document, if it is put into his hands to refresh his memory, or to state in whose handwriting it is only (*Lord* v. *Colvin*, 2 Drew. 208, 5 D. M. G. 47). Documents put into the hands of witnesses, &c.

Where an examination in bankruptcy of a bankrupt was referred to in the evidence of the plaintiff (the official assignee), it was held that the defendant was entitled to have the examination produced in cross-examining the plaintiff's witnesses (*Bell* v. *Johnson*, 1 J. & H. 682). See *Gwynne* v. *Watney*, 31 L. T. 231; see, too, as to a document referred to becoming evidence, *Howard* v. *Robinson*, 4 Drew. 522, 525. See also *Davis* v. *Dale*, 1 Mood. & M. 514, 515; *Perry* v. *Gibson*, 1 Ad. & Ell. 48. Documents referred to.

It seems that an examiner has full power to allow a shorthand writer to be present, or to admit the public if he think fit (*Wright* v. *Wilkin*, 6 W. R. 643, 4 Jur. N. S. 806). See, also, as to the employment of a shorthand writer, *Ex parte Curzon*, 6 W. R. 141. Whether examiner's office an open court.

XXXII. The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner (*k*), not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as Depositions to be taken down in writing and read over to the witness, who is to sign the same.

15 & 16 Vict. c. 86, s. 32.

may think fit to attend: Provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the Court as he shall think fit: Provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions (*l*); and the Court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.

On refusal, examiner to sign, and state any special matter he may think fit.

Power of examiner.

Examiner must take down depositions himself.

(*k*) The examiner is *bound* to take the depositions down in his own handwriting (*Stobart* v. *Todd*, 2 W. R. 617). But the rule appears to be different on an examination before the chief clerk under the 15 & 16 Vict. c. 80, s. 30, see *Rogers* v. *Mort*, 10 Hare, App. liii., and an examination was filed though not in the examiner's handwriting under Ord. XXXVII. r, 4, *Bolton* v. *Bolton*, L. R. 2 C. D. 217.

(*l*) The examiner ought not, where the examination is taken *ex parte*, to refuse to allow questions to be put, unless upon matters which would clearly not be evidence, *Surr* v. *Walmsley*, 2 L. R. Eq. 439.

Power of examiner.

The examiner has power to determine questions as to the adverse nature of the evidence of a witness (*Ohlsen* v. *Terrero*, L. R. 10 Ch. 127; but see *Buckley* v. *Cooke*, 1 K. & J. 29; *Wright* v. *Wilkin*, 6 W. R. 643, 4 Jur. N. S. 804).

If parties refuse to be sworn, &c., the same course to be pursued as is now adopted.

XXXIII. If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said Court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: Provided always, that if any witness shall demur or object to any question or questions which may be put to him (*m*), the question or questions so put, and the

Proviso as to witness demurring to questions.

demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the Court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court. 15 & 16 Vict. c. 86, s. 33.

(*m*) When a witness objects to answer because the examination is *irregular*, the party examining him should move that the examination may proceed (*Rendle* v. *Metropolitan and Provincial Bank*, 15 W. R. 1068; *Leather Cloth Company, Limited*, v. *Hirschfeld*, 1 H. & M. 295); but if he objects that he is *protected* from making the discovery, his demurrer should be set down for hearing; and see as to the costs following the result, *Wright* v. *Wilkin*, 4 Jur. N. S. 527. Process where witness demurs to answering.

When before this Act, a commissioner, notwithstanding the demurrer of a witness, took upon himself to examine a witness, the depositions were suppressed, even though the demurrer was held untenable (*Goodale* v. *Gawthorn*, 4 De G. & Sm. 97). A witness may demur to answering a question on the ground that the answer would criminate him without giving his reasons: but if he discloses his reasons, the Court will consider the objection; and if it finds it unfounded, will compel him to answer (*Aston's case*, 27 Beav. 474; 4 De. G. & J. 320; *Reg.* v. *Boyes*, 7 Jur. N. S. 1158; *Re Fernandez*, 10 C. B. N. S. 3, 39, 40). Grounds on which he may demur.

The sections relating to evidence in the Com. Law. Proc. Act, 1854, apply to suits in equity, *Buckley* v. *Cooke*, 1 K. & J. 29.

XXXIV. When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner (*n*), shall be transmitted by him to the record office of the said Court, to be there filed (*o*), and any party to the suit may have a copy thereof or of any part or portion thereof upon payment for the same in such manner as shall be provided by any general order of the Lord Chancellor in that behalf (*p*). Original depositions to be transmitted to the Record Office, and filed.

(*n*) Where an examiner omitted to sign the depositions, they were allowed to be filed without delay upon payment of costs, and upon a proper explanation being given (*Stephens* v. *Wanklin*, 19 Beav. 585). And when an examiner dies without signing, they may be signed by his successor (*Bryson* v. *Warwick and Birmingham Canal Company*, 1 W. R. 124; or filed without any signature, *Felthouse* v. *Bailey*, 14 W. R. 827). Omission to sign deposition.

(*o*) An examiner appointed under this section to take evidence for the *hearing* of the cause, must return *all* the depositions at once; but it seems the same rule does not apply, if the evidence is taken under sect. 40 (*Clark* v. *Gill*, 1 K. & J. 13). Filing of depositions.

(*p*) See as to copies Additional Order, August, 1875 (Costs), pt. II. *post.* Copies.

[XXXV. empowers any examiner appointed by any order of the Court to administer an oath.] Power to administer oath.

[XXXVI. provided that though the evidence in a cause was to be taken orally, affidavits by particular witnesses, or as to "particular facts or cir- Use of affidavits.

15 & 16 Vict. c. 86, s. 36.

" cumstances, might by consent, or by leave of the Court obtained upon " notice, be used on the hearing of any cause " (see now Ord. XXXVII. r. 1, pt. II. *post*)].

Affidavits to be divided into numbered paragraphs.

XXXVII. Every affidavit to be used in the said court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject (*q*).

(*q*) See Ord. XXXVII. r. 3 and note.

[XXXVIII. This section related to the time for closing of evidence, and provided for cross-examination of witnesses who made affidavits before the examiner within a certain time after the closing of the evidence, as follows :]

Cross-examination and re-examination of witnesses before examiner.

Provided always that any witness who has made an affidavit, filed by any party to a cause, shall be subject to oral cross-examination by or before an examiner in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of subpœna ad testificandum before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the Court shall think fit otherwise to direct (*r*).

Witnesses bound to attend.

As to expenses attending cross-examinations, &c.

Expense of producing witness.

(*r*) Under the new practice, the party producing the witness bears the expense of producing him in the first instance.

Court may require oral examination before itself of witnesses, &c.

XXXIX. Upon the hearing of any cause depending in the said Court, whether commenced by bill or by claim, the Court, if it shall see fit so to do (*s*), may require the production and oral examination before itself of any witness

or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit, or in such manner, as it may think fit (*t*). 15 & 16 Vict. c. 86, s. 39.

(*s*) This section seems to be superseded generally by Ord. XXXVII., r. 2, and XXXVIII., r. 4, pt. II., *post*. It has been held that the proper time for the Court to exercise its discretion (see *Oliver* v. *Wright*, 1 Sm. & G. App. xvi. ; *Evans* v. *Coventry*, 27 L. T. 39), under this section, is at the hearing, *Raymond* v. *Brown*, 4 De G. & J. 530 ; as to the costs, see *Langford* v. *May*, 1 W. R. 484. Section superseded.

Before a witness is examined *viva voce* by the Court under this section, the matter in issue, as stated in the pleadings, should be placed before the witness, and the particular passage marked, and the witness's affidavit relating to it should be given him, and he should be told that a further examination was wanted upon it, per V.-C. Wood, in *East Anglian Railway Company* v. *Goodwin*, 6 W. R. 564. Course adopted on examination.

(*t*) As to the expenses, see *Martin* v. *Pycroft*, 22 L. J. Ch. 94 ; *Langford* v. *May*, *ibid.* 978. Costs of examination before Court.

XL. Any party in any cause or matter (*u*) depending in the said Court may, by a writ of *subpœna ad testificandum*, or *duces tecum* (*v*), require the attendance of any witness before an examiner of the said Court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the Court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause ; and any party having made an affidavit to be used or which shall be used on any claim, motion, petition, or other proceeding before the Court, shall be bound on being served with such writ to attend before an examiner, for the purpose of being cross-examined (*w*) : Provided always, that the Court shall always have a discretionary power of acting upon such evidence as may be before it at the time (*x*), and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case. Any party in cause may by subpœna require attendance of any witness before an examiner.

(*u*) *E.g.*, in carrying out a sequestration, *D'Alteyrac* v. *Long*, W. N. (1868) 233. In any matter.

(*v*) The subpœna for documents must specify the documents required, and must be founded on the ordinary affidavit as to documents, *Fiott* v. *Mullins*, 1 Sm. & Giff. 1 ; *Wing* v. *Harvey*, *ibid.* App. x. ; *McIntosh* v. *Great Western Railway Company*, 4 D. M. G. 544 ; or the application for documents under it will be dismissed with costs, *Lee* v. *Angas*, L. R. 2 Eq. 59 ; *Newland* v. *Steere*, 13 W. R. 1014; but see *Re Emma Silver Mining Company*, L. R. 10 Ch. 194. Subpœna for documents must not be vague.

15 & 16 Vict. c. 86, s. 40.

Cons. Ord. XXVII. provided as follows with regard to subpœnas :—

Cons. Ord. XXVIII. Subpœnas.

Rule 1. Præcipe.

1. *Where it is intended to sue out a* subpœna, *a* præcipe *for that purpose, in the usual form and containing the name or firm and the place of business or residence of the solicitor or solicitors intending to sue out the same, and where such solicitor or solicitors is or are agent or agents only, then also the name or firm and place of business or residence of the principal solicitor or solicitors, shall in all cases be delivered and filed at the Office of the Clerks of Records and Writs. And on a* subpœna *for costs being sealed, the Taxing Master's certificate shall be produced to the officer sealing the writ as his authority for sealing it.*

[2. Provided for forms of writs.]

Rule 3. Number of persons in a subpœna other than a subpœna duces tecum.

3. *Every* subpœna, *other than a* subpœna duces tecum, *shall contain three names, where necessary or required.*

Rule 4. In subpœna duces tecum.

4. *No more than three persons shall be included in one* subpœna duces tecum ; *and the party suing out the same shall be at liberty to sue out a* subpœna *for each person, if it shall be deemed necessary or desirable.*

Rule 5. Alteration of subpœnas.

5. *In the interval between the suing out and service of any* subpœna, *the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ re-sealed upon leaving a corrected* præcipe *of such* subpœna, *marked with the words "altered and re-sealed," and signed with the name and address of the solicitor or solicitors suing out the same.*

Rule 6. Service of subpœna.

6. *The service of* subpœnas *shall be effected by delivering a copy of the writ and of the indorsement thereon, and at the same time producing the original writ.*

Rule 7. Service of subpœna to hear judgment.

[7. Related to service of a *subpœna* to hear judgment, which is no longer necessary.]

Rule 8. Affidavits to prove service.

8. *Affidavits filed for the purpose of proving the service of a* subpœna *upon any defendant, must state when, where, and how such* subpœna *was served, and by whom such service was effected.*

Rule 9. Time for service.

9. *The service of any* subpœna, *except a* subpœna *for costs, shall be of no validity if not made within twelve weeks after the* teste *of the writ.*

[Rule 10 related to the practice as to subpœnas to appear to bills filed on or before 1st November, 1852.] 15 & 16 Vict. c. 86, s. 40.

(*w*) The following affidavits have been decided to be open to cross-examination within this section :— What affidavits are open to cross-examination.

An affidavit made in support of a petition under the Trustee Relief Act, *Re Bendyshe*, 5 W. R. 816.

A creditor's affidavit as to his claim, even though he has obtained a judgment at law, *Cast* v. *Poyser*, 3 Sm. & Gif. 369 ; *Re Baker*, 11 W. R. 1127. Affidavits of creditor verifying claim ;

An accounting defendant's affidavit verifying his claim, *Re Lord*, L. R. 2 Eq. 605 ; but see Cons. Ord. XXXV. 34, p. 148, *ante*, and note (*f*) ; and *Meacham* v. *Cooper*, L. R. 16 Eq. 102.

An affidavit filed in support of an application for leave to amend, *Catholic Publishing Company* v. *Wyman*, 11 W. R. 399 ; but when the Court, exercising its discretion, had given leave to amend, it was held that no purpose could be answered by allowing the cross-examination, which was therefore refused (*ibid.*). of plaintiff applying for leave to amend.

An affidavit in support of, or against interlocutory motions, *Lloyd* v. *Whitty*, 19 Beav. 57. But when an affidavit had been filed in support of a motion for injunction, but the motion went off, it was held that the affidavit was not open to cross-examination, *Hooper* v. *Campbell*, 13 W. R. 1003 ; *Singer* v. *Awdsley*, 13 L. R. Eq. 401. On motions.

An affidavit as to documents is not within the section, note to Ord. XXXI. r. 13 (pt. II. *post*). Affidavit as to documents.

But the *cross-examination* cannot be read *against co-defendants* (*Rehden* v. *Wesley*, 26 Beav. 432).

A party cannot elect to withdraw his witness instead of producing him for cross-examination, *Catholic Publishing Company* v. *Wyman*, 1 N. R. 512 ; *Cauty* v. *Holditch*, 14 Sim. 75 ; *Clarke* v. *Law*, 2 K. & J. 28 ; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Pike* v. *Robinson*, W. N. (1873) 178 ; but see *Re Sykes*, 2 J. & H. 415. For and against whom cross-examination is evidence.

Where the affidavit was a formal one, merely proving service abroad, and had no relation to the merits of the case, a motion for cross-examination was disallowed, *Official Manager of National, &c., Association* v. *Carstairs*, 11 W. R. 866. Affidavit cannot be withdrawn, unless merely formal.

(*x*) As to a cause standing over when a witness was too ill to appear for cross-examination, see *Nason* v. *Clamp*, 12 W. R. 973.

Affidavits which the opposite party has had no opportunity of testing by cross-examination may, in pressing cases (but see *Bingley* v. *Marshall*, 6 L. T. N. S. 682), be admitted, but will have less weight attached to them : *e.g.*, where a plaintiff at law moved to dissolve an injunction, and the motion was not allowed to stand over that the other side might cross-examine his witnesses, *Normanville* v. *Stanning*, 10 Hare, App. xx. ; *Mayes* v. *Spence*, 1 J. & H. 87 ; *Wightman* v. *Wheelton*, 23 Beav. 397 ; but see *Besemeres* v. *Besemeres*, Kay, App. xviii., where the motion stood over that the witnesses might be cross-examined. For other cases where affidavits have been admitted for what they were worth, though on account of death or from other causes, no cross-examination had taken place on them, see *Abadom* v. *Abadom*, 24 Beav. 243 ; *Morley* v. *Morley*, 5 D. M. G. 610; *Davies* v. *Otty*, 13 W. R. 484 ; *Braithwaite* v. *Kearns*, 34 Beav. 202 ; *Ridley* v. *Ridley*, *ibid.* 329 ; *Tanswell* v. *Scurrah*, 11 L. T. N. S. 761 ; and see note to Ord. XXXVIII. r. 4 (pt. II., *post*). If no opportunity to cross-examine, affidavit has less weight, but may be admitted. Ord. XXXVIII. r. 4.

[Section XLI. related to taking evidence after the hearing.]

XLII. It shall not be competent to any defendant in any suit in the said Court to take any objection for want of parties to such suit in any case to which the rules next Parties representing others in same interest.

15 & 16 Vict. c. 86, s. 42.

hereinafter set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said Court,* and any law or practice of the said Court inconsistent therewith shall be and is hereby abrogated and annulled.

*See now Ord. XVI., r. 11, incorporating this section.

Legatees or next of kin.

Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person (*z*).

Legatees.

Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person (*z*).

Residuary devisee or heir.

Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree (*z*).

Cestuis que trusts.

Rule 4. Any one of several *cestuis que trusts* under any deed or instrument may, without serving any other of such *cestuis que trusts* have a decree for the execution of the trusts of the deed or instrument (*z*).

Cases of protection *pendente lite* and waste.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest (*z*).

Executors, &c.

Rule 6. Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestuis que trust* for the administration of the estate or the execution of the trusts (*z*).

Conduct of suit.

Rule 7. In all the above cases the Court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having

a common interest with him in the matters in question. 15 & 16 Vict. c. 86, s. 42.

Rule 8. In all the above cases the person who, according to the present practice of the Court, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings (*a*) in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the Lord Chancellor, apply to the Court to add to the decree (*b*). Notice of decree to be served.

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties (*c*). Trustees representing *cestuis que trusts*.

(*z*) Ord. XVI. r. 11 (pt. II., *post*), incorporates this section into the new rules. Ord. XVI. r. 9.

Compare these clauses with Ord. XVI. r. 9, (pt. II., *post*,) and see the note thereto, as to endorsing the writ "on behalf of" creditors, &c. Suing on behalf of others.

A *cestui que trust* is not under this section entitled as of right to a decree for administration, *e.g.*, the Court will see if it is for the benefit of infants, see *Wade* v. *Broadhurst*, 24 W. R. 232. Administration action by *cestui que trust*.

The general administration of an estate cannot be carried on without all the executors or accounting trustees being parties, *Latch* v. *Latch*, L. R. 10 Ch. 464. Trustees must be parties.

(*a*) The effect of service of the decree is to bind the interest of the persons served in the subject-matter of the suit, see *Doody* v. *Higgins*, 9 Hare, App. xxxii.; but they cannot be made to account without some independent proceeding to enforce the liability, *Walker* v. *Seligmann*, L. R. 12 Eq. 152; nor, on the other hand, can direct relief, *e.g.*, based on wilful default of trustees, be given on their behalf as if they were plaintiffs, *Whitney* v. *Smith*, L. R. 4 Ch. 513. Effect of serving notice of decree.

(*b*) See as to the power of the judge to dispense with service of notice of decree, p. 143, *ante*, and *De Balinhard* v. *Bullock*, 9 Hare, App. xiii. Dispensing with service.

15 & 16 Vict. c. 86, s. 42.

Cons. Ord. XXIII. 18—20, provided as follows—

Cons. Ord. XXIII. r. 18. Time for person served to move to add to decree.

18. *The time within which a party served with a notice of a decree under the stat.* 15 & 16 *Vict. c.* 86, *s.* 42, *may apply to the Court to add to the decree, shall be one month after such service.*

Rule 19. Memorandum of service of notice of decree.

19. *A memorandum of the service upon any person of notice of the decree in any suit under the 8th Rule of the same section, shall be entered in the office of the Clerks of Records and Writs, upon due proof by affidavit of such service.*

Rule 20. How notice entitled and endorsed.

20. *Notice of a decree or order served pursuant to the 8th Rule of the same section shall be entitled in the cause, and there shall be endorsed thereon a memorandum in the form or to the effect following, that is to say, "Take notice that, from the time of the service of this notice, you* [*or, as the case may be, the infant, or person of unsound mind*] *will be bound by the proceedings in the above cause in the same manner as if you* [*or, the said infant, or person of unsound mind*] *had been originally made a party to the suit; and that you* [*or, the said infant, or person of unsound mind*] *may, by an order of course, have liberty to attend the proceedings under the within-mentioned decree* [*or, order*]*; and that you* [*or, the said infant, or person of unsound mind*] *may, within one month after the service of this notice, apply to the Court, to add to the decree* [*or, order*]."

Cons. Ord. VII. r. 5.

Cons. Ord. VII. r. 5, provides as follows—

Where persons to be served are infants, or of unsound mind.

5. *Where any person required to be served with notice of a decree or order, pursuant to the 8th rule of the 42nd section of the stat.* 15 & 16 *Vict. c.* 86, *is an infant or a person of unsound mind not found so by inquisition, the notice shall be served upon such person or persons and in such manner as the judge to whose Court the cause is attached may direct.*

Serving notice of decree.

See further as to serving notice of the decree on infants, *Clarke* v. *Clarke*, 1 W. R. 48, 9 Hare, App. xiii.

Notice of the decree may be served out of the jurisdiction, *Strong* v. *Moore*, 22 L. J. Ch. 917; *Chalmers* v. *Laurie*, 10 Hare, App. xxvii.; *Maybery* v. *Brooking*, 7 D. M. G. 673. 15 & 16 Vict. c. 86, s. 42.

Where a person served with the decree, afterwards married, the proper way to bring the trustees of the marriage settlement before the Court was held to be by service of the decree, *White* v. *Stewart*, 35 Beav. 304; but when trustees appointed after decree obtained an order of course to attend the proceedings, it was discharged as irregular, *Colyer* v. *Colyer*, 11 W. R. 355. Out of jurisdiction. Parties who acquire interest in suit.

See *Lewis* v. *Clowes*, 10 Hare, App. lxii.; *Williamson* v. *Jefferys*, 12 W. R. 403. Order for liberty to attend proceedings.

When parties served with notice of a decree do not attend proceedings a chambers, it is not necessary before signing the certificate to serve them with summons to proceed, *Green* v. *Measures*, 1 W. N. (1866) 122.

(*c*) The clause as to trustees representing their *cestuis que trusts* is substantially identical with Ord. XIV. r. 7, *post*, pt. II. Trustees representing *cestuis que trusts*. Ord. XIV. r. 7.

For the application of this section to suits by *cestui que trusts*, see *McLeod* v. *Annesley*, 16 Beav. 600; *Jesse* v. *Bennett*, 6 D. M. G. 609; *Bridget* v. *Hames*, 1 Coll. 72; *Clegg* v. *Rowland*, L. R. 3 Eq. 368.

Cons. Ord. VII. r. 1, provides that—

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him. Cons. Ord. VII. r. 1. Dispensing with heir-at-law.

[XLIII. abolished setting down causes on objection for want of parties.]

XLIV. If in any suit or other proceeding (*d*) before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person (*e*), or to appoint some person (*f*) to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially or generally by public advertisements; and the order (*g*) so made by the said Court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court. Court may proceed in any suit, &c. without representative of deceased person, or may appoint one.

15 & 16 Vict. c. 86, s. 44.

(*d*) Special cases (*Swallow* v. *Binns*, 9 Hare, App. xlvii.); and petitions (*Re Stewart*, *ibid.* xlii.), are within the section.

What proceedings are within the section.

(*e*) An action for administration is defective when there is no legal personal representative before the Court, *Rowsell* v. *Morris*, L. R. 17 Eq. 20, except by consent, *Jones* v. *Foulkes*, 10 W. R. 55.

(*f*) See as to administrators *ad litem* appointed by the Probate Division, *Groves* v. *Levi*, 9 Hare, App. xlvii. n.; *Williams* v. *Allen*, 10 W. R. 512, reversing 32 Beav. 656, and 20 & 21 Vict. c. 77 (the Probate Act).

Representative appointed by Court of Probate.

The Court will not appoint a person to represent an estate where there is personal responsibility, *Fyfe's* case, 17 W. R. 870, and see *Devaynes* v. *Robinson*, 24 Beav. 86; and *Williams* v. *Allen*, 10 W. R. 512, reversing 32 Beav. 656; nor would the Court order money to be paid out to an administrator *ad litem* (*ibid.*).

Does not give right of general administration.

And it is enacted by the Probate Act, 20 & 21 Vict. c. 77, s. 70, "that the administrator so appointed shall have all the rights and powers of a general administrator *other than the right of distributing the residue of such personal estate.*" The administrator may also be appointed receiver of the rents of real estate (s. 71).

20 & 21 Vict. c. 77.

By the 73rd section of the same Act, the Court of Probate may, "whenever it shall appear necessary or convenient by reason of the insolvency of the deceased or other special circumstances," appoint a nominee of its own to be administrator of the personal estate of a deceased person, and "*every such administration may be limited as the Court shall see fit*," *Re John Jones*, 6 W. R. 276.

Ord. XVI. r. 9a. Appointing persons to represent estate.

A person may be appointed to represent an heir, or next of kin, or a class, for the purpose of construing an instrument on which their right may depend, Ord. XVI. r. 9a. *post*, pt. II.

Section does not apply—

(1) where no difficulty in administration;

The section was not intended to apply to cases (1) Where there is no difficulty in obtaining representation, see *Long* v. *Storie*, 1 Kay, App. xii. (in which case V.-C. Wood refused to act behind the back of a person who was on the point of administering to the estate), *Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514.

(2) Where interest of party to be bound is not represented;

(2) Where the interest of the party sought to be bound is not otherwise represented in the suit, *Cox* v. *Stephens*, 11 W. R. 929; see *Gibson* v. *Wills*, 21 Beav. 620; *Headden* v. *Emmott*, 22 L. T. 166, the *dicta* in which case, however, must be taken with some qualification (see the observations of the Master of the Rolls in *Dean of Ely* v. *Gayford*, 16 Beav. 561). So a general representative is required when a decree is sought against the very party to be represented, as where a sub-mortgagee sought a decree for foreclosure, without making the personal representatives of the first mortgagee parties, *Rowlands* v. *Evans*, 33 Beav. 202; *Bruiton* v. *Birch*, 22 L. J. Ch. 911; the objection will not apply, however, when the heir at law and executors named in the will of a deceased person, whose estate may be charged by the suit, are parties, though the executors have not proved (*Goddard* v. *Haslam*, 3 W. R. 357). Comp. *Ex parte Cramer*, 9 Hare, App. xlvii.; *Williams* v. *Rowlands*, 3 N. R. 233. Nor does the section apply (3) where the object of the suit is not to administer the estate of the intestate (see 20 & 21 Vict. c. 77, s. 70, *supra*).

(3) Where general administration is sought;

In *James* v. *Aston*, 2 Jur. N. S. 224; *Maclean* v. *Dawson*, 27 Beav. 21, the bill was filed to set aside transactions on the ground of fraud of the intestate, but as the result of such setting aside would have been an administration decree, it was held that the section did not apply.

(4) or the administrator *ad litem* would have to be active.

(4) Nor where a personal representative of the intestate would have active duties to perform in the execution of a decree, *Fowler* v. *Bayldon*, 9 Hare, App. lxxviii. So the Court will not, under this section, appoint a person to receive a sum of money in Court, payable to a deceased person, though the amount be small (*Rawlins* v. *McMahon*, 1 Drew. 225); and even where a representative has been appointed in the suit, it will not direct the money to be paid to him, but will order it to be carried over to a separate account, *Byam* v. *Sutton*, 19 Beav. 646, where one of two trustees died, after the chief clerk's certificate the cause was allowed to proceed in the absence of his representative, *Moore* v. *Morris*, L. R. 13 Eq. 139.

Where the Court *will* act under section.

Where a necessary party to a suit had disappeared many years before in Australia, and it was not certain that he was dead, so that his legal personal

15 & 16 Vict. c. 86, s. 44.

representative could not be made a party, a representative *ad litem* to protect his interest was appointed, *Mortimer* v. *Mortimer*, 11. W. R. 740.

And where it is difficult to obtain representation to the intestate's estate, and it is not important that his interest should be separately represented, the Court will act under the section, *e.g.*, where the intestate had no beneficial interest, and his estate was insolvent, *Chalfers* v. *Headlam*, 9 Hare, App. xlvi. ; but as to insolvency, see *Cox* v. *Stephens*, 11 W. R. 929 ; so where there were two executors, co-defendants, and one of them, who was also a residuary legatee, but who had not proved the will, or acted in the trust thereof, died insolvent and without a representative, after the usual order for taking the accounts had been made, it was held that the suit might proceed, as if his legal personal representative had been served and had appeared (*Rogers* v. *Jones*, 1 Sm. & G. 17 ; *Davies* v. *Boulcott*, 1 Dr. & Sm. 23 ; *Ashmall* v. *Wood*, 4 W. R. 60, 110 ; cf. *Bessant* v. *Noble*, 26 L. J. Ch. 236 ; *Band* v. *Randle*, 2 W. R. 331, where a representative was dispensed with) *Twynam* v. *Porter*, W. N. (1869) 228 ; *Hayward* v. *Pyle*, L. R.7 Ch. 634. And, as a general rule, the Court it seems, will incline to act under the section, when the next of kin expressly refuses to administer (*Haw* v. *Vickers*, 1 W. R. 242 ; *Tarrett* v. *Lloyd*, 2 Jur. N. S. 371) ; or pays no attention to a notice calling upon him to administer (*Whiteaves* v. *Melville*, 5 W. R. 676 ; *Davies* v. *Boulcott, loc. cit.* see *Joint Stock Discount Company* v. *Brown*, L. R. 8 Eq. 376) ; or dies without doing so, *Swallow* v. *Binns*, 9 Hare, App. xlviii. ; but see 20 & 21 Vict. c. 77, s. 73 *ante;* under which the Court of Probate may grant limited administration to its own nominee.

Where intestate was insolvent.

Refusal of next of kin to administer.

In a suit for an account of a trading association in India, and contribution, the Court appointed the Indian executor of a deceased associate his representative under the section, *Sutherland* v. *De Virenne*, 2 Jur. N. S. 301. And where a defendant, interested in an estate which was being administered by the Court, died abroad, and his executors proved the will abroad but refused to prove it in this country, the Master of the Rolls (following *Hewetson* v. *Todhunter*, 22 L. J. Ch. 76) appointed a representative of the deceased defendant in order that the suit might be revived against him (*Bliss* v. *Putnam*, 29 Beav. 20). The section, too, applies where the claim of the deceased defendant is consequent upon a remote possibility. See *Hobbs* v. *Bird*, W. N. 1876, 95. So a claim for the appointment of new trustees was allowed to proceed in the absence of a personal representative of a deceased person, when such deceased person had an interest in the trust funds, in the event of the death of his child (the infant plaintiff), but had died indebted, and without any other property (*Maynay* v. *Davidson*, 9 Hare, App. lxxxii.) ; and *à fortiori*, when the interests of the deceased defendant are identical with those of the plaintiff, or with those of other parties represented, *Hewetson* v. *Todhunter*, l. c. ; *Cox* v. *Taylor*, 22 L. J. Ch. 910 ; and *Long* v. *Storie*, Kay, App. xii. ; where a subsequent mortgagee (one of eight persons standing in a precisely similar situation, and in respect of whose mortgages only one right of redemption was given), having died after a decree for foreclosure, the Court, there being difficulty in obtaining representation to his estate, held that the suit might proceed without any person representing it, see the marginal note ; and comp. *Abrey* v. *Newman*, 10 Hare, App. lxviii. n. ; where a declaration that children took *per capita*, and not *per stirpes*, was made in the absence of the personal representatives of the deceased children ; and *Tarrett* v. *Lloyd*, 2 Jur. N. S. 371, where on a bill filed for the specific performance of an agreement for a lease entered into by four defendants in joint tenancy, one of whom died after suit was instituted, intestate and insolvent, the Court, on the next of kin appearing in court, and declining to take out administration (see *Davies* v. *Boulcott*, 1 Dr. & Sm. 23), ordered a person to be appointed to represent the estate of the deceased person. And see *Williams* v. *Allen*, 10 W. R. 512 ; reversing, s. c. 29 Beav. 292, where the suit was instituted against a trustee to make him personally liable for trust funds come into the hands of tenants for life, and the Lords Justices held that the estates of such tenants for life were sufficiently represented by an administrator *ad litem*. See Williams on Executors, 1863.

Will proved abroad.

Claim remote, or identical with that of parties represented.

15 & 16 Vict. c. 86, s. 44.

Where a decree had been made in ignorance of the death of a defendant before decree, a statement was inserted that the Court proceeded in the absence of his personal representative, *Rucker* v. *Scholefield*, 1 N. R. 180.

Order made after decree.

Where a cause was ordered to stand over for want of parties, with liberty to the plaintiff to amend, by adding them or their representatives, a motion that the suit might proceed in the absence of a representative of one of such parties who had died without leaving one, was refused with costs (*Williams* v. *Page*, 27 Beav. 373).

Refused where cause stood over for want of parties.

Who will and will not be appointed.

The proper person to be appointed under this section is the person who would be appointed administrator *ad litem* (*Dean of Ely* v. *Gayfovd*, 16 Beav. 361). Where a defendant in a suit died and his will was not proved in consequence of a contest as to one of his testamentary papers, the Court appointed the executor named in his will to represent him (*Hele* v. *Lord Bexley*, 15 Beav. 340. Cf. *Ashmall* v. *Wood*, 4 W. R. 60). So the executor of a testator who had proved the will in India, but had refused to take out letters of administration in England, was appointed to represent his estate under this section (*Sutherland* v. *De Virenne*, 2 Jur. N. S. 301; see, too, *Hewetson* v. *Todhunter*, 22 L. J. Ch. 76). But where a will appointing a person executrix, and giving the testator's estate to her, was being contested in the Probate Court, the Court refused to appoint such person to represent the testator's estate in a suit to take the partnership accounts of a firm of which the testator was a member, *Rowlands* v. *Evans*, 33 Beav. 202.

Executor who proved abroad.

Executors of next of kin.

In *Swallow* v. *Binns*, 9 Hare, App. xlvii., in which case the executors of a father, who had survived, and became the next sole of kin of his deceased children, were appointed to represent the estates of the deceased children.

Widow.

In *The Dean of Ely* v. *Gayford*, 16 Beav. 561, a widow was appointed to represent the estate of her husband, who was a tenant for life of tithes, and had died without a personal representative.

Consent must be given.

No order can be made without the consent of the person sought to be appointed (*Hill* v. *Bonner*, 26 Beav. 372; *The Prince of Wales, &c., Company* v. *Palmer*, 25 Beav. 605). In a suit instituted to establish a settlement, the Court refused to appoint a person disputing the settlement, and already appointed receiver of the deceased settlor's estate, to represent the settlor (*Vacy* v. *Vacy*, 1 L. T. N. S. 267).

Form, &c., of order.

(*g*) As to the form of an order under this section, see *Hele* v. *Lord Bexley*, 15 Beav. 340; *Whittington* v. *Gooding*, 10 Hare, App. xxix.; Seton on Decrees, p. 1178. Before the order is drawn up notice should be given to the persons entitled to administer (*Davies* v. *Boulcott*, 1 Drew. & Sm. 23); but it seems that the order may be made at the hearing (*Hewetson* v. *Todhunter*, 22 L. J. Ch. 76; *Mendes* v. *Guedalla*, 10 W. R. 485). This course was pursued in *Lloyd* v. *Attwood*, L. J. Nov. 3, 1858. In *Chaffers* v. *Headlam*, 9 Hare, App. xlvi., it was made on motion on notice to all parties.

Duties payable.

Where duties were payable and a representative *ad litem* had been appointed under the section, the Court dispensed with production of letters of administration on evidence that the Commissioners of Inland Revenue would be willing to accept a sum equal to administration duty without the production of an actual grant of letters of administration, *Re Ranking*, L. R. 6 Eq. 601.

Creditor, &c., may summon executor, &c., to show cause why an order for administration of personal estate should not be granted.

XLV. It shall be lawful for any person claiming to be a creditor, or a specific pecuniary or residuary legatee, or the next of kin, or some or one of the next of kin, of a deceased person, to apply for and obtain as of course, without bill or claim filed, or any other preliminary proceedings, a summons (*h*) from the Master of the Rolls or any of the Vice-Chancellors, requiring the executor or administrator,

as the case may be, of such deceased person, to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted; and upon proof by affidavit of the due service of such summons, or on the appearance in person or by his solicitor or counsel of such executor or administrator, and upon proof by affidavit of such other matters, if any, as such judge shall require, it shall be lawful for such judge, if in his discretion he shall think fit so to do, to make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require (*i*), and the order so made shall have the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties; provided that such judge shall have full discretionary power to grant or refuse such order, or to give any special directions touching the carriage or execution of such order, and in the case of applications for any such order by two or more different persons or classes of persons, to grant the same to such one or more of the claimants or of the classes of claimants as he may think fit: and if the judge shall think proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the judge may direct (*k*).

15 & 16 Vict. c. 86, s. 45.

Power to judge to order administration of such estate.

(*h*) Administration summonses do not appear to be touched by Ord. I., r. 1, but they may be affected by Ord. XIX., as to pleadings (pt. II.), *post*; for by section 100 (Interpretation Clause) of the Judicature Act, 1873 (with which the Judicature Act and General Orders of 1875 are incorporated), "pleading" is to include petitions and summons.

Section applies to simple administration only.

As to proceedings at chambers under these sections, see Cons. Ord. XXXV. r. 6, p. 139, *ante*, *Re Berkeley*, L. R. 19 Eq. 467.

The section applies only to simple cases, *Rump* v. *Greenhill*, 20 Beav. 512, 520. When, therefore, the defendant in an administration summons set up a release, the validity of which was disputed, the Court dismissed the summons as irregular (*Acaster* v. *Anderson*, 19 Beav. 161); and the Court refused to make an administration decree on summons taken out by a married woman in her husband's absence, as no satisfactory proof could be given of his death under that mode of proceeding, *Re Sampson*, 14 W. R. 472; but see *West* v. *Laing*, 3 Drew. 331, and note (*i*), *infra*.

Whether it applies to cases of assignment; of appointment.

Whether the assignee or mortgagee of a residuary legatee can obtain the summons, seems to be doubtful (*Whittington* v. *Edwards*, 3 De G. & J. 243).

The Court has power under this section to make an order for the administration of the effects bequeathed by the will of a married woman made in

15 & 16 Vict. c. 86, s. 45.

pursuance of a power (*Sewell* v. *Ashley*, 3 D. M. G. 933), *Re Berkeley*, 19 L. R. Eq. 467, notwithstanding *Re Newbery*, 10 W. R. 378.

Form of summons.

(*l*) In general only the usual administration order will be made on an administration summons (*Partington* v. *Reynolds*, 4 Drew. 253; *Blakely* v. *Blakely*, 1 Jur. N. S. 368; *Re Fryer*, 3 K. & J. 317. See *Jones* v. *Morrell*, 2 Sim. N. S. 241). But the Court has power, on reasonable grounds, to direct

What order made on summons.

further accounts or inquiries on such a summons (*Mutter* v. *Hudson*, 2 Jur. N. S. 34; *Delevante* v. *Childe*, 6 Jur. N. S. 118); and where the suit was commenced by summons, and in the course of inquiries therein directed, it

Further inquiries.

became necessary to determine the validity of an alleged agreement for a settlement, in order to ascertain the amount of personal estate, it was held that the chief clerk had power to determine such question, *Wadham* v. *Rigg*, 2 Dr. & Sm. 78; and after an order made on the summons, the Court stayed an action at law against the executor, as after a decree obtained on a

Not a decree charging executor with wilful default;

bill (*Gardner* v. *Garrett*, 20 Beav. 469). In *Brooker* v. *Brooker*, 3 Sm. & G. 475, V.-C. Stuart made an order for an injunction and receiver, as against the administratrix of a deceased intestate, after the common decretal order had been made in chambers, a case of wilful default against the administratrix having come out in the course of the proceedings under the order in chambers, &c. (see, too, as to wilful default, *Tickner* v. *Smith*, 3 Sm. & G. 42, before the same judge). But this case has not been generally followed, for in *Partington* v. *Reynolds*, 4 Drew. 253, V.-C. Kindersley held that the Court had no power to charge the defendant as for wilful default, as by so doing, it would be directing accounts on a footing inconsistent with the decree itself (see *Hodson* v. *Ball*, 1 Phil. 177; *Coope* v. *Carter*, 2 D. M. G. 298; *Massey* v. *Massey*, 2 J. & H. 728; *Nelson* v. *Booth*, 3 De G. & J. 119, under the 54th section, and the cases cited above).

or on admission of assets;

In *Re Wiltshire's Estate*, 8 W. R. 133, it was held by V.-C. Stuart, that an executor cannot, on an administration summons, be charged upon an admission of assets.

or with refusal to account.

Where the representative of an executrix in effect refused to account, a person interested was held to be justified in filing a bill, particularly if questions of construction arose (*Smith* v. *Spilsbury*, 1 Drew. & Sm. 151).

Staying suit after summons.

(*k*) As to staying proceedings where two administration suits have been instituted for the same purpose, see note to Ord. V., r. 2 (pt. II.), *post*.

Copy of summons to be filed in record office of court.

XLVI. A duplicate or copy of such summons shall, previously to the service thereof, be filed in the record office of the said court; and no service thereof upon any executor or administrator shall be of any validity unless the copy so served shall be stamped with a stamp of such office indicating the filing thereof; and the filing of such summons shall have the same effect with respect to lis pendens (*l*) as the filing of a bill or claim.

(*l*) See 2 & 3 Vict. c. 11.

Creditor, &c., may obtain an order for

XLVII. It shall be lawful for any person claiming to be a creditor of any deceased person, or interested under

his will, to apply for and obtain in a summary way, in the manner hereinbefore provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of a deceased person, where the whole of such real estate is by devise vested in trustees (*m*), who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate (*n*); and all the provisions hereinbefore contained with respect to the application for such order in relation to the personal estate of a deceased person, and consequent thereon, shall extend and be applicable to an application for such order as last hereinbefore mentioned with respect to real estate (*o*).

15 & 16 Vict. c. 86, s. 47.

administration of real estate, devised in trust for sale.

(*m*) So where they are empowered to sell the realty, though not expressly devised to them, *Colman* v. *Turner*, L. R. 10 Eq. 230, and where the sale was to be delayed five years, *De la Salle* v. *Moorat*, L. R. 11 Eq. 8.

(*n*) A devisee of real estate, subject to the payment of a testator's debts and funeral and testamentary expenses, is a trustee within the section, *Ogden* v. *Lowry*, 4 W. R. 156. See also *Pigott* v. *Young*, 7 W. R. 235, V.-C. K.; *Smith* v. *Spilsbury*, 1 Dr. & Sm. 151.

Devisee of real estate subject to debts.

(*o*) See the notes to sect. 45.

XLVIII. It shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee (*p*), or of any subsequent incumbrancer, or of the mortgagor (*q*), or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct (*r*), and if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the Court (*s*), for the purpose of securing the performance of such terms as the

Court may direct sale of mortgaged property instead of a foreclosure on such terms as it may think fit.

15 & 16 Vict. c. 86, s. 48.

Court may think fit to impose on the party making such request.

(*p*) The right of an *equitable* mortgagee by deposit without memorandum is foreclosure, not sale, *Samble* v. *Wilson*, 5 N. R. 395; *James* v. *James*, L. R. 16 Eq. 153.

Object of section.

Mortgagee's right to sale.

A legal mortgagee cannot obtain an order under this section, except where it would be for the advantage of all parties. The Court will not, therefore, act under it, when such a course would be an act of oppression towards the mortgagor, as, for instance, when it would dispossess a family of an old family estate, *Hurst* v. *Hurst*, 16 Beav. 375. And when the mortgagor or subsequent incumbrancers dissent, the mortgagee must make out a special case, in order to induce the Court to order a sale, *Roberts* v. *Price*, 1 W. R. 303; and comp. *Hiorns* v. *Holtom*, 16 Jur. 1077, where the Master of the Rolls expressed a reluctance to order a sale under this section, unless by consent, except in cases when there was such a complication that the common decree could not be conveniently worked out. See, however, *Newman* v. *Selfe*, 33 Beav. 522. In a foreclosure suit against an infant, the Court, it being clearly for his benefit, ordered an immediate sale (*Mears* v. *Best*, 10 Hare, App. li.); see *Wigham* v. *Measor*, 5 W. R. 394; and see *Siffken* v. *Davies*, Kay, App. xxi., cited in note (*e*) to sect. 42. In this case, however, the Court required an affidavit by the trustee that the sale would be advantageous to the infant. Where the mortgagors were bankrupt, and there were several incumbrancers, the Court directed a sale (*Cator* v. *Reeves*, 9 Hare, App. liii. n.). So, though in *Wickham* v. *Nicholson*, 19 Beav. 38, a sale was ordered at the request of the first and second mortgagees and mortgagor, the third mortgagee refusing to consent (and see *Paine* v. *Edwards*, 10 W. R. 709; *Foster* v. *Harvey*, 11 W. R. 899; 12 W. R. 92); yet in *Messer* v. *Boyle*, 21 Beav. 559, it was held, that a judgment creditor ranking after a first mortgagee, but prior in date to a further charge and to other judgments, was entitled to a decree for foreclosure and redemption, although the other parties desired a sale. Comp. *Footner* v. *Sturgis*, 5 De G. & Sm. 736; *Tuckley* v. *Thompson*, 1 J. & H. 126, and cases there cited.

When mortgagor dissents.

When some of the incumbrancers dissent.

Sale at request of mortgagor.

(*q*) The mortgagor may obtain an order under the section though the mortgagee dissents, *Newman* v. *Selfe*, 33 Beav. 522. See *Whitfield* v. *Roberts*, 7 W. R. 216; and as to the right of a tenant for life, subject to incumbrances, to ask for a sale, see *Cook* v. *Cholmondeley*, 5 W. R. 835.

Conduct of sale.

When mortgagee dissents.

Where the sale is applied for by and granted at the instance of a second incumbrancer, the Court, in the exercise of its discretion, will give the conduct of the sale to the first mortgagee (*Hewitt* v. *Nanson*, 7 W. R. 5; and see Daniell, 1167, and Cons. Ord. XXXV. 13, p. 141, *ante*). As to the evidence which will be required where the mortgagee dissents from the order for sale, asked for by the mortgagor, and asks for foreclosure, see *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, W. N. (1872) 155.

On what terms sale is ordered.

(*r*) The Court will not, under this section, in the first instance, or in the absence of the owners of the equity of redemption, direct a sale, but will, as in the case of a foreclosure, fix a day for the payment, and, in default, direct a sale (*Smith* v. *Robinson*, 1 Sm. & G. 140; comp. *Lloyd* v. *Whittey*, 17 Jur. 754), unless all the parties consent (*Anning* v. *Lavers*, 1 W. R. 19); but in *Newman* v. *Selfe*, 33 Beav. 522, the Master of the Rolls held that the Court might direct an immediate sale, notwithstanding the dissent of the mortgagor; and in *Marriott* v. *Kirkham*, 10 W. R. 340, an immediate sale was ordered. The usual time is six months (*Lloyd* v. *Whittey*, l. c.). In *Whitfield* v. *Roberts*, 7 W. R. 216, the time fixed was four months from the certificate, and this time was afterwards extended; but when a sale was manifestly for the benefit of all parties, the Court directed it to take place in one month (*Staines* v. *Rudlin*, 9 Hare, App. liii., note; and cf. *Wigham* v. *Measor*, 5 W. R. 394, where an immediate sale was ordered). It seems that an equitable mortgagee is not, even since the Act, entitled to a decree for sale except by consent (*Cox* v. *Toole*, 20 Beav. 145, *sed quære*).

15 & 16 Vict. c. 86, s. 48.

It was held by V.-C. Stuart, that mortgagees might, under this section, file a bill for an account of what was due to them, and for a sale, although the mortgage contained a power of sale, and *a foreclosure was not prayed for* by the bill (*Hutton* v. *Sealey*, 6 W. R. 350). See also, in connection with this section, *Sporle* v. *Whayman*, 20 Beav. 607; *Macrae* v. *Ellison*, 4 Jur. N. S. 967.

Foreclosure need not be prayed for.

At what stage of suit sale ordered.

The Court will not, under this section, order a sale on an interlocutory application (*Wayn* v. *Lewis*, 1 Drew. 487); and it has been said that a sale cannot be directed after a decree for foreclosure has been made (*ibid.*); even on the application of the mortgagee (*Girdleston* v. *Lavender*, 9 Hare, App. liii.). And in a case in which a decree for foreclosure had been made in February, 1851, and in January, 1853, after report made, an order was taken by consent that the plaintiff, the first mortgagee, should be at liberty to continue in possession until the 23rd of June, 1854, and that upon payment within one week after that date of the amount due, the plaintiff should convey, &c., but that in default of such payment the defendants should be foreclosed without further order or further extension of time, a motion by the second mortgagee for further extension of time, and that in the meantime the property might be sold under this section, was refused, with costs (*Campbell* v. *Moxhay*, 18 Jur. 641; see marginal note). In *Laslett* v. *Cliffe*, 2 Sm. & G. 278, however, V.-C. Stuart considered that the section gave power to direct a sale after a decree for foreclosure had been made, being of opinion that the Court ought not, if a plaintiff had obtained a decree, to insist upon his proceeding against his will on a decree which he obtained for his own advantage, when he preferred a different course authorised by the Legislature (cf. *Cook* v. *Cholmondeley*, 5 W. R. 835). It will be observed that these remarks do not apply to such a case as *Campbell* v. *Moxhay*, l. c., where the party applying had not the carriage of the suit. As to the form of the decree for sale under this section, see *Staines* v. *Rudlin*, 16 Jur. 965; *Cator* v. *Reeves*, 16 Jur. 1004; Seton, p. 365.

Whether after decree for foreclosure.

Deposit when sale ordered without consent of mortgagee.

(*s*) The deposit must be enough "to meet at a rough estimate the possible expenses of an abortive attempt at a sale" (*Bellamy* v. *Cockle*, 2 W. R. 326); see *Corsellis* v. *Patman*, 4 L. R. Eq. 156; *Witts* v. *Young*, W. N. (1870) 172; and a reserved bidding will be fixed sufficient to cover the sum found due to the mortgagee (*Whitfield* v. *Roberts*, 7 W. R. 216); and when the mortgagor declined to deposit 100*l.*, an order for foreclosure was made (*Boydell* v. *Manby*, 9 Hare, App. liii.). As a general rule the conduct of the sale, even when it is asked for by the second mortgagee, will be given to the first (*Hewitt* v. *Nansan*, 7 W. R. 5).

[XLIX. enacted that suits should not be dismissed for misjoinder. See now Ord. XVI. 13 (pt. II.) and note].

No suit to be objected to if only declaratory order sought.

L. No suit (*t*) in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby (*u*), and it shall be lawful for the Court to make binding declarations of right without granting consequential relief (*v*).

Petition under Trustee Relief Act.

(*t*) A petition under the Trustee Relief Act is within the section (*Re Walker*, 16 Jur. 1154, and see sect. 30 of "Trustee Act, 1850"). But see *Sharshaw* v. *Gibbs*, Kay, 333.

(*u*) This could not be done under the old law (see *Grove* v. *Bastard*, 2 Phil. 622).

"Consequential relief."

(*v*) Where a declaration is asked and also an injunction, such injunction is consequential relief (*Marsh* v. *Keith*, 1 Drew. & Sm. 342).

No power under section

The tendency of the decisions on this section has been considerably to restrict its operation. Thus, it was held by Lord Justice Turner that it

15 & 16 Vict. c. 86, s. 50.

gave the Court no power to declare *future rights* (*Lady Langdale* v. *Briggs*, 8 D. M. G. 391); see *Garlick* v. *Lawson*, 10 Hare, App. xv., where the Court, on a special case, refused to make a binding declaration under this section as to the interests of parties entitled in reversion. See, also, *Gosling* v. *Gosling*, 1 Jo. 265; *Fyfe* v. *Arbuthnot*, 1 De G. & J. 406; *Bell* v. *Cade*, 10 W. R. 38; *Dowling* v. *Dowling*, L. R. 1 Ch. 612; *Davis* v. *Earl of Dysart*, 20 Beav. 413; *Pennell* v. *Earl of Dysart*, 27 Beav. 542, where the suits were nominally for production of title deeds, but really sought to obtain declarations of future rights.

to declare future rights.

Or to bind infants.

When some of the parties were infants, and therefore unable to bind themselves, it was held that the Court had no power, even by consent, to decide a purely legal question, so as to bind the infants (*Webb* v. *Byng*, 8 D. M. G. 633); and see *De Windt* v. *De Windt*, 1 L. R. Eng. & Ir. App. 87, 92.

Court will not make order guarding against claim which may not arise.

Nor will the section entitle a party to a prospective declaration guarding against a claim which may never be made. Thus, when a lease was granted to two partners, the covenants being only joint at law, and the representative of one partner deceased filed a bill against the lessor, alleging that he claimed a right under the covenants if a breach should arise, and praying a declaration that he had no such right, notwithstanding the section, a demurrer was allowed (*Jackson* v. *Turnley*, 1 Drew. 617, *qu. vid.*); and it seems the section does not apply, unless the plaintiff would be entitled to consequential equitable relief if he chose to ask it (*Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Jackson* v. *Turnley. loc. cit.*). Nor, it seems, could the Court, under this section, make a decree declaratory of a merely legal right (*Trustees of the Birkenhead Docks* v. *Laird*, 4 D. M. G. 732, 738; see, too, *Bristow* v. *Whitmore*, 4 K. & J. 743; *Norman* v. *Johnson*, 8 W. R. 300; and the remarks of Sir James Colville in L. R. 2 Indian Appeals, 184-186.

Nor declaration of legal right.

When Court makes declaration to save expenses, &c.

In *Byam* v. *Byam* (19 Beav. 58), the Court, to save expense, made a declaration respecting the construction of certain marriage articles, instead of directing a settlement. Comp. *Wright* v. *King*, 18 Beav. 461, where a similar course was adopted in the case of a ward of Court whose fortune was small. In *Hope* v. *Hope*, 4 D. M. G. 328, a declaration upon a point of English law was made for the information of a foreign court. Compare note to sect. 3 of Lord Cairns' Act, *post*.

Fictitious suit.

For cases where a small settlement has been made for the purpose of raising a question as to legitimacy and getting a declaratory decree, see *Gurney* v. *Gurney*, 1 H. & M. 413; *Anon.*, 2 H. & M. 124; *Andrews* v. *Salt*, L. R. 8 Ch. 622.

Special cases.

Compare note Ord. XXXIV. r. 1 (part II.), *post*, as to cases which will be decided on special cases.

Lands Clauses Act.

A decree declaratory of a future right was made in *Bogg* v. *Midland Ry. Company*, L. R. 4 Eq. 310, where the amount of the purchase-money to which a lessee was entitled under the Lands Clauses Act, depended on the question whether he was entitled to a prospective right of renewal, see note (*b*) to s. 79 of the Lands Clauses Act, p. 47, *ante*.

Court may decide between some of the parties without making others interested parties to the suit.

LI. It shall be lawful for the Court to adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen (*w*), or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instru-

ment, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument, to be executed under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen: Provided always, that if the Court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed. 15 & 16 Vict. c. 86, s. 51. Proviso.

(*w*) "The Court may deal with the matter in controversy as far as "regards the rights and interests of the parties actually before it," Ord. XVI. r. 13 (part II.), *post*. Ord. XVI. r. 13.

The section only applies when some of the persons interested in the question at issue, *in every point of view*, are before the Court (*Swallow* v. *Binns*, 9 Hare, App. xlvii.). Thus, when the question was between the claims of the surviving children, and the representatives of deceased children under a settlement, the Court refused to proceed in the absence of any party representing the interests of the deceased children (*ibid.*). A party will not be allowed to proceed with the case under this section by striking the names of some of the defendants (who are out of the jurisdiction) out of the record, and proceeding without them (*Lanham* v. *Pirie*, 2 Jur. N. S. 1201). Interest of absent persons must be represented.

It must be remembered that the section does not render the decree of the Court binding on the absent parties, as the 42nd section of the Act did (see now Ord. XVI. 11), when notice of the decree had been served upon them under the 8th rule (*Doody* v. *Higgins*, 9 Hare, App. xxxii.). Decree does not bind them.

This section enables the Court to direct the administration of one or more specific trusts created by an instrument without directing the performance of all (*Parnell* v. *Hingston*, 3 Sm. & G. 337; *Prentice* v. *Prentice*, 10 Hare, App. xxiii.). Partial administration.

But it does not enable the Court to make a decree for foreclosure or for sale in the absence of a party entitled to one-third of the equity of redemption, *Caddick* v. *Cook*, 32 Beav. 70.

[LII. related to the revivor of suits, see now Ord. L. and note (pt. II.), *post*.] Revision.

[LIII. provided that new facts might be introduced as amendments, see now Order XXVII. r. 1 (pt. II.), *post*.]

LIV. It shall be lawful for the Court, in any case where any account is required to be taken, to give such special directions (*x*), if any, as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the Court that the circumstances of the case are such as to Where account required to be taken, Court may give special directions as to the mode of taking same.

15 & 16 Vict. c. 86, s. 54.

require such special directions; and particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.

Special directions as to mortgaged property.

(*x*) As to applications under this section to be made in chambers, see *Hardwick* v. *Wright*, 15 W. R. 953.

Special directions for the including certain costs were held unnecessary in a redemption suit, *Blackford* v. *Davis*, L. R. 4 Ch. 304.

Special accounts of the sale of a mortgaged estate were directed against a mortgagee who had been in possession, *Wolff* v. *Vanderzee*, 17 W. R. 547; see *Nelson* v. *Booth*, 3 De G. & J. 119; see other cases cited in note (*i*) to s. 45, and *Dean* v. *Thwaite*, 21 Beav. 621; *Hobson* v. *Jones*, L. R. 9 Eq. 456, 462.

Books *primâ facie* evidence.

The chief clerk admits a settled account without an order, *Newen* v. *Wetten*, 31 Beav. 315; but may not take books as *primâ facie* evidence without such order, *Cookes* v. *Cookes*, 11 W. R. 817.

As to special directions where vouchers have been lost, &c., see *Lodge* v. *Pritchard*, 3 D. M. G. 906; *Ewart* v. *Williams*, 7 D. M. G. 74.

Where Court will and will not act under the section.

For cases where accounts were ordered to be taken as *primâ facie* evidence of the truth of the matters therein contained against the plaintiff, with liberty to surcharge and falsify, see *Sleight* v. *Lawson*, 3 K. & J. 292; *Stainton* v. *Carron Company*, 24 Beav. 346. Where the books of a manufactory, of which the plaintiff was manager, were kept by the defendant, it was held by V.-C. Wood that the contents, though not binding on the plaintiff, might, as he had free access thereto, be taken as *primâ facie* evidence against him, with liberty to him to surcharge and falsify (*Ogden* v. *Battams*, 1 Jur. N. S. 791, *qu. vid.*). Accounts which went back nearly thirty years were ordered to be taken as *primâ facie* evidence as against *cestuis que trusts*, who had always had access to them, *Banks* v. *Cartwright*, 15 W. R. 417; and see *Hardwick* v. *Wright*, *ibid.* 953.

Entries by solicitor.

In *Morgan* v. *Higgins*, 5 Jur. N. S. 240, where a solicitor was ordered to deliver a bill of costs, an agreement for payment of a fixed sum being set aside, V.-C. Stuart refused to direct that entries made by him several years before, and contemporaneous with the transactions, should be taken as *primâ facie* evidence under this section (see *Coleman* v. *Mellersh*, 2 Mac. & G. 309; and as to limiting an account to a certain time, *Dean* v. *Thwaite*, 21 Beav. 621).

Court may order real estate to be sold if required.

LV. If after a suit shall have been instituted in the said court, in relation to any real estate, it shall appear to the Court that it will be necessary or expedient that the said real estate, or any part thereof, should be sold for the purposes of such suit (*y*), it shall be lawful for the said Court to direct the same to be sold at any time after the institution thereof, and such sale shall be as valid to all intents and purposes as if directed to be made by a decree or decretal order on the hearing of such cause; and any party to the suit in possession of such estate, or in receipt

of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser or such other person as the Court shall direct. 15 & 16 Vict. c. 86, s. 55.

(*y*) By a decree accounts were directed of the deficiency, if any, in trust funds which the estate of a deceased trustee was declared liable to answer. Before certificate, but after it had been ascertained that there would be a deficiency, and that the personal estate of the deceased trustee would be insufficient, the existing trustee had redeemed a mortgage on the real estate of the deceased trustee, and therefore the persons interested in the trust fund now petitioned for an immediate sale of the property so redeemed; and it was held that the Court had jurisdiction to order the sale under this section, *Bell* v. *Turner*, L. R. 2 Ch. Div. 409, where *Tulloch* v. *Tulloch*, L. R. 3 Eq. 574, *Prince* v. *Cooper*, 16 Beav. 546, are cited; see *Heath* v. *Fisher*, 17 W. R. 69; and see now Ord. XL. 11 (pt. II.), *post*. Sale before decree.

In a suit to carry the trusts of a will into execution, the Court may direct a sale to raise the costs of the suit, even though some of the plaintiffs are infants, *Mandeno* v. *Mandeno*, Kay, App. ii.; *Swan* v. *Webb*, 1 W. R. 90; but not against the will of a person beneficially interested, who submits to pay his share of the costs, *Lees* v. *Lees*, L. R. 15 Eq. 151. Infants.

An order was made under this section for the sale of real estate pending a reference to the Master (*Martin* v. *Hadlow*, 1 W. R. 101). Application under section, how made.

[LVI. relates to the Conveyancing Counsel, and is quoted *ante*, note (*b*), p. 133.]

LVII. Where any real or personal property shall form the subject of any proceedings in the Court of Chancery, and the Court shall be satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such suit (*z*), it shall be lawful for the said Court, at any time after the commencement of such proceedings, to allow to the parties interested therein, or any one or more of them, the whole or part of the annual income of such real property, or a part of such personal property, or a part or the whole of the income thereof, up to such time as the said Court shall direct, and for that purpose to make such orders as may appear to the said Court necessary or expedient (*a*). Where real or personal property is the subject of proceedings, Court may allow part or whole of the annual income.

(*z*) The allowance will not be made unless the executors admit assets (*Knight* v. *Knight*, 16 Beav. 358); nor unless the parties are clearly entitled, and there is some pressing reason for making it (*Rowley* v. *Burgess*, 2 W. 652; *Chubb* v. *Carter*, 2 W. N. (1867) 179). Where allowance will be made.

(*a*) See *Stacey* v. *Southey*, 1 Drew. 400, where an allowance of the income of a married woman's separate estate was ordered to be made to her, pending a suit to charge her with the value of timber cut, security having been given for the value of the timber.

Applications under this section should be made in chambers, *Bentley* v. *Craven*, 1 W. R. 362. Application made in chambers.

[LVIII. assimilated the practice as to common injunctions to the practice as to special injunctions.] Injunctions.

15 & 16 Vict. c. 86, s. 59.

[LIX. provided that, on application for injunctions, the answer of the affidavit should be treated as an affidavit only.]

Mistakes in procedure.

[LX. provided that mistakes in procedure might be rectified on payment of such costs as the Court should direct.]

Questions of law.

[LXI. directed that the Court should decide questions of law.]

[LXII. gave the Court jurisdiction to determine legal titles.]

[LXIII., LXIV. provided for general rules and orders for carrying the Act into effect.]

[LXV. relates to salaries of the examiners.]

Construction of terms.

LXVI. In the construction of this Act the words "bill of complaint" shall mean also and include information; the word "affidavit" shall mean also and include affirmation; the expression "Lord Chancellor" shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners of the Great Seal of the United Kingdom for the time being; and the expression "General Order of the Lord Chancellor" shall mean General Order of the Lord Chancellor with such advice and assistance as aforesaid.

[LXVII. provided that the Act should commence November 1, 1852.]

OATHS IN CHANCERY ACT.

16 & 17 VICT. CAP. 78.

An Act relating to the Appointment of Persons to administer Oaths in Chancery, and to Affidavits made for Purposes connected with Registration (*a*).

[15*th August*, 1853.

16 & 17 Vict. c. 78, s. 1.

"Masters Extraordinary" to cease to be so styled, and to be designated "Commissioners."

I. The persons now styled "Masters Extraordinary in Chancery" shall cease to be so styled, and they and all persons hereinafter appointed by the Lord Chancellor to execute like duties in England shall be designated "Commissioners to administer oaths in Chancery in England" (*a*), and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of Master Extraordinary in Chancery by virtue of any statute or order of the Court of Chancery or of

the Lord Chancellor, or usage in that behalf, or otherwise (*b*). 16 & 17 Vict c. 78, s. 1.

(*a*) By the 77th section of the Judicature Act, 1873, *post*, the Commissioners appointed by this Court are attached to the Supreme Court; and by section 82 of the same Act, they are made Commissioners to administer oaths in all causes and motions which may from time to time be depending in the High Court or the Court of Appeal. See further as to the appointment and removal of the Commissioners, section 84 of the same Act.

(*b*) Cons. Ord. IV. provides as follows : Cons. Ord. IV.

Commissioners not to do any act incident to their office within ten miles of Lincoln's Inn Hall.

The Commissioners to administer Oaths in Chancery in England shall not, within ten miles of Lincoln's Inn Hall, take any affidavits, pleas, answers, disclaimers, or acknowledgments of deeds or recognizances, or do any other act incident to their office. And every such commissioner shall express the time when, and the place where, he shall take any affidavit, plea, answer, or disclaimer, or the acknowledgment of any deed or recognizance, otherwise the same shall not be held authentical nor be admitted to be filed or enrolled. And in like manner every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office.

Power to appoint solicitors to administer oaths and take declarations in Chancery, and to be styled "London Commissioners."

II. It shall be lawful for the Lord Chancellor from time to time to appoint any persons practising as solicitors (*c*) within ten miles from Lincoln's Inn Hall at their respective places of business (*d*) to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled "London Commissioners to administer oaths in Chancery," and they shall be entitled to charge and take a fee of one shilling and sixpence for every oath administered by them, and for every declaration, affirmation, or attestation of honour taken by them, subject to any order of the Lord Chancellor varying or annulling the same.

(*c*) The solicitor in the cause, or his clerk, or agent (but see *Re Gregg*, L. R. 9 Eq. 137) is excluded, *Hopkin* v. *Hopkin*, 10 Hare, App. ii.; *Wood* v. *Harpur*, 3 Beav. 290; but a plaintiff being a solicitor, but not the solicitor in the cause excluded.

16 & 17 Vict. c. 78, s. 2.

in the cause, was allowed to put in an affidavit sworn before his clerk, *Foster* v. *Harvey*, 11 W. R. 899.

(*d*) These words are not to be taken as defining the place where the oath is to be administered, but the range within which the solicitors are to practise, *Re Record and Writ Clerks*, 3 D. M. G. 723.

Oath, where to be administered.

Commissioners may be appointed to administer oaths in Chancery for the Channel Islands.

III. It shall be lawful for the Lord Chancellor from time to time to appoint any persons practising as solicitors in the Isle of Man, in the Channel Islands (*e*), or any of them, to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled "Commissioners to administer oaths in Chancery for the Channel Islands," and they shall be entitled to charge and take the same fees as the said "Commissioners to administer oaths in Chancery."

Jersey.

(*e*) Affidavits to support an application for a *habeas corpus* may be sworn before a Commissioner to administer oaths in Chancery in Jersey, there being no commissioners in that island for taking affidavits for the common law courts (*Re Dodd*, 6 W. R. 174).

Commissioners appointment to bear a Chancery stamp of 1*l.* in lieu of other charges.

IV. The fiat or document by which any such commissioners as aforesaid shall be appointed shall bear a Chancery stamp of one pound, in lieu of the stamp of five shillings now required; but no other charge or fee shall be made or payable in respect of such appointment, or of anything requisite to be done in order to perfect the same; and it shall not be necessary that any such appointment should be published in the London Gazette.

Nothing to lessen power of Lord Chancellor.

V. Nothing herein contained shall abridge or lessen the power of the Lord Chancellor as it now exists to appoint fit persons to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, or to regulate the fees to be taken by them, and where any Act of Parliament refers to the Masters Extraordinary in Chancery, or to their powers or duties, the reference shall be held to apply to, and include, the commissioners hereinbefore mentioned, or to their powers or duties, as the case may be.

Reference to Masters Extraordinary in Acts to apply to commissioners.

[Sect. VI. extends the provisions of 15 & 16 Vict. c. 86, ss. 22—24, to the Isle of Man, see note (*b*), p. 175, *ante*.]

VII. That where any person is or shall be authorised to administer oaths for the High Court of Chancery, such person is and shall be authorised to administer oaths for all suits and matters whatsoever in the Chancery of the County Palatine of Lancaster; and where any plea, answer, affidavit, or other document whatsoever is or shall be receivable in evidence in the High Court of Chancery, the same shall be in like manner receivable in the said Court of the county palatine. 16 & 17 Vict. c. 78, s. 7. Persons authorised to administer oaths in Chancery may administer oaths in Chancery of County Palatine of Lancaster.

VIII. The term "Lord Chancellor" shall mean also and include the Lord Keeper and Lords Commissioners for the custody of the Great Seal for the time being. Term "Lord Chancellor."

CHARITABLE TRUSTS ACT, 1853.

16 & 17 VICT., CAP. 137, S. 28.

XXVIII. Where the appointment or removal of any trustee (*a*) or any other relief, order, or direction relating to any charity of which the gross annual income for the time being exceeds thirty pounds shall be considered desirable, and such appointment, removal, or other relief, order, or direction might now be made or given by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction, or by the Lord Chancellor intrusted with the care and commitment of the custody of lunatics, it shall be lawful for any person authorised in this behalf by the order or certificate of the said board, or for the Attorney-General to make application (without any information, bill, or petition) to the Master of the Rolls, or one of the Vice-Chancellors sitting at chambers, for such order, direction, or relief as the nature of the case may require; and the Master of the Rolls or the Vice-Chancellor to whom any such application shall be made, shall and may proceed upon and dispose of such application in chambers, save where he may think fit otherwise to direct, and shall and may have and exercise thereupon all such jurisdiction, power, and authority, and make such Jurisdiction in chambers, where income of charities ~~does not~~ exceeds 30*l.* to appoint or remove trustees or give other relief.

16 & 17 Vict. c. 137, s. 28.

orders, and give such directions in relation to the matter of such application as might now be exercised, made, or given by the Court of Chancery, or by the Lord Chancellor intrusted as aforesaid in a suit regularly instituted, or upon petition as the case may require; and the Master of the Rolls and Vice-Chancellors respectively shall, in relation to such applications as aforesaid, and the proceedings thereon (subject to any rules which may be made by the Lord Chancellor, with the advice and consent of them or any two of them) have all such powers of directing matters to be heard in open Court, and of ordering what matters shall be heard and investigated by themselves and their chief clerks respectively, and such other powers and authorities as by the Act of the last session of Parliament chapter eighty,* are vested in or authorised to be exercised by them at chambers, and the provisions of the said Act applicable to orders made by the Master of the Rolls or any of the Vice-Chancellors at chambers, shall extend to all orders so made under this Act: Provided always that save as may be otherwise provided by any rules to be made by the Lord Chancellor, with such advice and consent as aforesaid, the determinations of the Master of the Rolls and Vice-Chancellors respectively, upon and in relation to such applications as aforesaid, shall not be subject to appeal in any case where the gross annual income of the charity does not exceed one hundred pounds: Provided also, that it shall be lawful for the Master of the Rolls or any Vice-Chancellor, where, under the circumstances of any application as aforesaid, he may so see fit, to direct that or obtaining the relief, order, or direction sought for by such application, an information bill or petition, as the case may require, shall be filed or presented and prosecuted as now by law required, and to abstain from further proceeding on such application.

*15 & 16 Vict. c. 80. p. 125, *ante*.

Jurisdiction of bankruptcy and county courts;

(*a*) The jurisdiction to appoint new trustees, on petition, under the Trustee Act, is not taken away, though it is seldom exercised, see note (*r*), p. 98, *ante*. The district Courts of Bankruptcy and County Courts were given similar jurisdiction over charities with an income under 30*l*., and now, by the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), over charities with an income up to 50*l*.

By the Act of 1860, sect 2, a concurrent jurisdiction over charities is given to the Charity Commissioners, as to charities with an income exceeding 50*l.*, on the application of the majority of the trustees, and as to charities with a less income, on the application of the Attorney-General, the trustees, or any person interested in the Charity, or inhabiting the place where it is situate, unless they think the case *from some difficulty of law or fact, fitter for the adjudication of a Court.*

16 & 17 Vict. c. 137, s. 28. Jurisdiction of charity commissioners.

Cons. Ord. XLI. rr. 10—13, provided as to proceedings under this section as follows :—

Cons. Ord. XLI.

10. *Any application to a judge in chambers under "The Charitable Trusts Act,* 1853," *section twenty-eight, shall be made by summons, and such summons may be in the form set out in Schedule (K) No.* 1,* *or as near thereto as the nature of the case may permit.*

Rule 10. Application by summons.

* The general summons in chambers.

[Rule 11 of the Cons. Ord. XLI. provides that the fees payable shall be the same as the fees payable in respect of other proceedings commencing by summons.]

Rule 11. Fees on proceedings in chambers.

12. *Where the judge directs that any matter commenced by summons under the said Act shall be heard in open Court, the same fees shall be payable and the same costs shall be allowed, as would have been payable in respect of any other matter so heard.*

Rule 12. Fees and costs on summons.

13. *No order made under the said Act by the judge in chambers, shall be subject to appeal, where the gross annual income of the charity has not been declared by the Charity Commissioners for England and Wales to exceed one hundred pounds, unless the judge by whom such order may have been made shall certify that such appeal ought to be permitted, either absolutely or on such terms as the judge may think fit to impose.*

Rule 13. Appeal.

MERCHANT SHIPPING ACT, 1854.

17 & 18 VICT. CAP. 104.

An Act to amend and Consolidate the Acts relating to Merchant Shipping.

PART IX.—*Liability of Shipowners.*

S. 502—506.

13 & 14 Vict. c. 60, s. 502.

DII. The ninth part of this Act shall apply to the whole of Her Majesty's Dominions.

Application of Part IX. of the Act.

LIMITATION OF LIABILITY.

Limitations on the liability of the owners of ships.

DIII. No owner of any seagoing ship (*a*) or share therein shall be liable to make good any loss or damage that may happen, without his actual fault, or privity of, or to any of the following things (that is to say) :—

(1). Of or to any goods, merchandise, or other things, whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship;

(2). Of or to any gold, silver, diamonds, watches, jewels or precious stones, taken in or put on board any such ship, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship the true nature and value of such articles;

to any extent whatever.

Railway company owning steamers.

(*a*) A railway company carrying passengers and goods, partly by railway and partly by their own ships, is entitled to the limitation of liability under this Act, *L. & S. W. Railway* v. *James*, L. R. 8 Ch. 241.

Limitation of liability for loss of life or goods to the total value of freight calculated at 15*l.* per ton.
* The amount of liability

DIV. No owner of any seagoing ship or share therein shall, in cases where all or any of the following events occur, without his actual fault or privity (that is to say) :—

(1). Where any loss of life* or personal injury is caused to any person being carried in such ship.

(2). Where any damage or loss is caused to any goods, merchandize, or other things whatsoever, on board any such ship; 17 & 18 Vict. c. 104, s. 504.

(3). Where any loss of life or personal injury is by reason of the improper navigation of such seagoing ship, as aforesaid, caused to any person carried in any other ship or boat; for loss of goods is limited to 8*l.* per ton by 25 & 26 Vict. c. 63, s. 54, *infra*.

(4). Where any loss or damage is by reason of any such improper navigation of such seagoing ship, as aforesaid, caused to any other ship or boat, or to any goods, merchandize, or other things whatsoever, on board any other ship or boat;

be answerable in damages to an extent beyond the value (*b*) of his ship and the freight due, or to grow due in respect of such ship during the voyage, which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso (that is to say): that in no case where any such liability as aforesaid is incurred, in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than fifteen pounds per registered ton.

(*b*) As to the meaning of "value," see *African Steam Company* v. *Swanzy*, 2 K. & J. 660; *Leycester* v. *Logan*, 4 K. & J. 725. "Value."

[By Section 505, the term freight is to include the value of the carriage of the goods and the passage money.]

[By Section 506, the owner is to be separately liable for every loss of life and damage of goods, arising on distinct occasions.]

Mode of Procedure.

[By Section 507, the local Board may direct proceedings in cases of loss of life or personal injury.] Proceedings directed by local Board.

[By Section 508, either party to the inquiry may call for special jury.]

[By Section 509, the conduct of the proceedings by the local Board is provided for.]

[By Section 510, the damages for each loss of life or injury are to be £30, and the application of the amount payable is provided for (see now 25 & 26 Vict. c. 63, s. 54, *infra*).]

[By Sections 511, 512, 513, individuals may institute actions on their own account if dissatisfied with the statutory damages, or if the local Board decline to institute proceedings.]

17 & 18 Vict. c. 104, s. 514.

Power for court to stay actions, determine liability, and distribute amount among claimants.

DXIV. In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom, in respect of loss of life or personal injury, it shall be lawful in England or Ireland for the High Court of Chancery,* and in Scotland for the Court of Session, and in any British possession for any competent Court to entertain proceedings at the suit of any owner, for the purpose of determining the amount of such liability (*c*), subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants with power for any such Court to stop all actions (*d*) and suits pending in any other Court in relation to the same subject-matter; and any proceedings entertained by such Court of Chancery or Court of Session or other competent Court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs (*e*) as the Court thinks just.

* See sect. 34, sub.-s. 2 of the Judicature Act, 1873, *post*.

Owner must admit liability.

(*c*) The owner must admit liability, *Hill* v. *Andus*, 1 K. & J. 263, 24 L. J. Ch. 229, see *James* v. *L. & S. W. Ry.*, L. R. 7 Ex. 287, 295.

Conflict of Admiralty jurisdiction.

(*d*) See *Leycester* v. *Logan*, 3 K. & J. 446, and as to the remedy under the section where a judgment has been obtained in the Admiralty Division condemning the ship, see also *London & S. W. Ry.* v. *James*, L. R. 8 Ch. 253. By sect. 13 of 24 Vict. c. 10, the jurisdiction given by this section was conferred also upon the Court of Admiralty, whenever any ship or the proceeds thereof were under arrest of the Admiralty Court, see *James* v. *L. & S. W. Ry. Company*, L. R. 7 Ex. 287.

Costs.

(*e*) The plaintiff pays all the costs, *African Steam Company* v. *Swanzy*, 2 K. & J. 660.

MERCHANT SHIPPING AMENDMENT ACT, 1864.

25 & 26 VICT. CAP. 63, SECT. 54.

25 & 26 Vict. c. 63, s. 54.

Limitation of liability of owners of ships in case of loss of life or damage to merchandize without their fault.

LIV. The owners of any ship, whether British or Foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say:—

(1). Where any loss of life or personal injury is caused to any person being carried in such ship;

(2). Where any damage or loss is caused to any goods, merchandize, or other things whatsoever on board any such ship;

(3). Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat;

(4). Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

15*l.* for loss of life.

8*l.* for loss, &c. of goods.

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandize, or other things to an aggregate amount, exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandize, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room (*a*).

(*a*) The remainder of the section provides for the measure of the tonnage in the case of foreign ships.

INFANTS' SETTLEMENT ACT.

18 & 19 VICT. CAP. 43.

An Act to enable Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage.

[*2nd July*, 1855.

18 & 19 Vict. c. 43.

WHEREAS great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property: For remedy whereof be it enacted, &c., as follows:

Settlements by infants with the approbation of the Court. * See Judicature Act, 1873, sect. 34, sub.-s. (2), *post.*

I. From and after the passing of this Act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery* (*a*), to make a valid and binding settlement (*b*) or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

Duty of Court under this Act.

(*a*) The Act did not impose on the Court any other duty than that of looking to the propriety of the *settlement;* and consequently, the propriety of the marriage itself is not a question for its consideration, though of course "what in each case may be a proper settlement must sometimes lead to an inquiry as to all the circumstances connected with the marriage." (*Re Dalton*, 6 D. M. G. 201.)

Course of proceeding.

Evidence must be adduced to show the age, rank, and position in life, and the property or fortune of the proposed husband or wife. Regul. 20 as to business in chambers, xx. (p. 171, *ante.*)

18 & 19 Vict. c. 43, s. 1.

And see as to the employment of the conveyancing counsel, *Re Williams*, 8 W. R. 678, and notes to 15 & 16 Vict. c. 80, s. 40, 41, p. 132-6, *ante*.

Where the infant was a ward of Court in a suit, two petitions were presented, the first to obtain an order for a strict settlement, and the second to sanction the settlement when prepared, *Powell* v. *Oakley*, 34 Beav. 575. See *Re Yates*, 7 W. R. 711.

Draft how settled.

Where a female infant's fortune was very considerable, the Court referred the whole matter to chambers (*Re Olive*, 11 W. R. 819); but under special circumstances the reference to chambers was dispensed with, *Ex parte Smith*, 22 W. R. 294.

Reference to chambers.

The Master of the Rolls refused to allow a clause providing that, in the event of any person professing the Roman Catholic religion becoming entitled, he should forfeit his interest under the settlement (*Re Williams*, 8 W. R. 678). But the insertion of the usual name and arms clause was permitted (*ibid.*)

What clauses inserted in settlement.

(*b*) The Court has no jurisdiction under this Act to approve a settlement of an infant's property originally made without its concurrence (per V.-C. Stuart in *Re Fuller's Settlement*, Feb. 10, 1860).

Settlement made out of court.

The Act extends to post-nuptial settlements, *Powell* v. *Oakley*, 34 Beav. 575, and see *Re Hoare*, 11 W. R. 181.

Post-nuptial settlement.

Proceedings commenced with respect to an infant under the Act in no way prevent the payment out to the infant when of age, if no settlement has been made, *Sams* v. *Cronin*, 22 W. R. 204.

In case infant dies under age, appointment, &c., to be void.

II. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

The sanction of the Court of Chancery to be given upon petition.

III. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition (*c*) presented by the infant or his or her guardian (*d*), in a summary way, without the institution of a suit; and if there be no guardian, the Court may require a guardian to be appointed or not, as it shall think fit; and the Court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

Application by petition.

(*c*). A petition is necessary though a suit or action is pending, *Pearcth* v. *Marriott*, 1 W. N. (1866), 48, and see *Harvey* v. *Clark*, 25 Beav., 7, under Settled Estates Act, s. 16, p. 222, *post*.

Guardian petitioning.

(*d*) In *Re Strong*, 26 L. J. Ch. 64, Lord Justice Knight Bruce thought that an affidavit of the respectability of the person who acted as guardian ought to be produced. The application must not be by a next friend, and a petition presented by a next friend without the infant's concurrence was dismissed with costs, *Re Potter*, L. R. 7 Eq. 484; but see *Wortham* v. *Pemberton*, 1 De G. & Sm. 644.

18 & 19 Vict. c. 43, s. 4.

IV. Provided always, that nothing in this Act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years (*e*).

Not to apply to males under 20, or to females under 17 years of age.

(*e*) Evidence must be produced to show the age of the infant (20th Regul. as to business, August, 1857, Appendix, p. 171, *ante*.

LEASES AND SALES OF SETTLED ESTATES ACT.

19 & 20 VICT. CAP. 120.

An Act to facilitate Leases and Sales of Settled Estates.
[29*th July*, 1856.

19 & 20 Vict. c. 120, s. 1.

WHEREAS it is expedient that the Court of Chancery should have power in certain cases to authorise leases and sales of settled estates (*a*) where it shall deem that such leases or sales would be proper and consistent with a due regard for the interests of all parties entitled under the settlement; and it is also expedient that persons in possession of land for certain limited interests should have power to grant agricultural or occupation leases thereof, at rack-rent, for a reasonable period: Be it enacted, &c., as follows:

1 Wm. 4, c. 65.

(*a*) As to applications on behalf of infants for leasing powers, &c., under 1 Wm. 4, c. 65, see *Re Clark*, 1 L. R. Ch. 292; *Re Spencer*, 16 W. R. 306; *Re Letchford*, L. R. 2 C. D. 719, W. R. (1876) 184; where an estate by the curtesy prior to that of the infant, was held no objection to the exercise of jurisdiction under the Act.

Interpretation of certain terms.

I. The word "settlement," as used in this Act, shall signify any Act of Parliament, deed, agreement, copy of court roll, will or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure (*b*) or any estates or interests in any such hereditaments stand limited to or in trust for any persons, by way of succession (*c*), including any such instruments affecting the estates of any one or more of such persons exclusively; and the term "settled estates," as used in this Act, shall signify all hereditaments of any

tenure and all estates or interests in any such hereditaments which are the subject of a settlement, and for the purposes of this Act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life. 19 & 20 Vict. c. 120, s. 1.

(*b*) In an application for a sale of real estate, where the property comprised copyholds, the Court directed that the copyholds should be enfranchised before the sale, and the costs of the enfranchisement paid out of the proceeds, *Re Adair*, L. R. 16 Eq. 124. Copyholds.

(*c*) In determining what is a *settled estate* within this Act, it must be borne in mind that:— What is a settled estate.

(1) The Act extends to settlements made before the passing of the Act; see sec. 44, p. 254, *post*. Act extends to:

(2) The words "settlement" and "settled estates" in this Act include *estates* in remainder, &c., not disposed of by the settlement and *reverting* to a settlor or a testator's heir. See sect. 1 of the Amendment Act, 1858, p. 255, *post*. (1) Estates settled before Act.

(3) Lords of settled manors are authorised to give licences to their *copyhold* or customary tenants to grant leases of lands held by them to the same extent and for the same purposes as leases may be authorised or granted of freehold hereditaments under this or the new Act. See sect. 3 of the Amendment Act, p. 255, *post*. (2) Estate reverting. (3) Copyholds.

(4) "In determining what are settled estates within the Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect;" Amendment Act, 1864, s. 3, p. 239, *post*: see *Collett* v. *Collett*, L. R. 2 Eq. 203; *Re Williams*, 20 W. R. 967; *Bayley* v. *Carter*, L. R. 4 Ch. 230; and before that Act, *Re Birtle*, 11 W. R. 739. (4) Estates *settled* when the instrument took effect.

(5) Where parties absolutely entitled to some shares in an estate, the other shares being in settlement, joined in an application for a sale, the Court decreed the whole estate to be sold, *Re Goodwin*, 3 Giff. 620. Lands devised to a widow during life or widowhood and then to trustees for sale, were directed to be sold under the Act, *Carlyon* v. *Truscott*, L. R. 20 Eq. 348, 352. (5) Where *part* is settled.

(6) Where lands were devised to trustees in trust to sell at their discretion, and hold the proceeds in trust for a tenant for life, with remainder to children, the lands were held to be settled within the meaning of the Act, and a lease for twenty-one years was directed, *Re Laing*, 1 L. R. Eq. 416. See *Re Greene*, 10 Jur. N. S. 1098; *Collett* v. *Collett*, L. R. 2 Eq. 203. (6) Lands though converted in equity.

Where lands are limited in fee, defeasible in certain events, they are not limited by way of succession within the Act, see *Re Burdin*, 7 W. R. 711, unless the gift over is upon trusts, *Re Horn*, 29 L. T., N. S. 830, but in a case similar to *Re Burdin*, an order for a lease may be made under 1 Wm. IV. c. 65, s. 17, if all persons who may be entitled are before the Court, *Re Clark*, L. R. 1 Ch. 292, and compare *Re Williams*, 20 W. R. 967. Trusts for *accruer* do not make settlement.

II. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases (*d*) of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, Power of High Court of Judicature to authorise leases of settled estates, subject to certain conditions.

19 & 20 Vict. c. 120, s. 2.

whether involving waste or not, providing the following conditions be observed:

First, every such lease shall be made to take effect in possession (*e*) at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease twenty-one years, for a mining lease, or a lease of water, water mills, wayleaves, waterleaves, or other rights or easements, forty years, and for a building lease (*f*) ninety-nine years, or where the Court shall be satisfied that it is the usual custom of the district (*g*) and beneficial to the inheritance to grant building leases for longer terms, then for such term as the Court shall direct (*h*):

Secondly, on every such lease shall be reserved the best rent (*i*) or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine:

Thirdly, where the lease (*j*) is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned; namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent, by the appointment of trustees or otherwise, as the Court shall deem expedient (*k*):

Fourthly, no such lease shall authorise the felling of any trees, except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease:

Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof; and every

such lease shall contain a condition for re-entry on non-payment of the rent for a period not less than twenty-eight days after it becomes due. 19 & 20 Vict. c. 120, s. 2.

(*d*) As to who may petition, see sect. 16, p. 222, *infra*, and *Taylor* v. *Taylor* there cited. As to settling leases in chambers, see note to sect. 10, *infra*. Who may petition.

Where some of the leases proposed to be granted were to be at a peppercorn rent, it was held that a private Act should be applied for, *Cust* v. *Middleton*, 3 D. F. J. 33, and for a declaratory decree that it is fit and proper that an application should be made to parliament to extend the leasing powers affecting an estate, see *Savile* v. *Bruce*, 29 Beav. 557. Leases how settled. When *private Act* is necessary.

(*e*) A lease may be authorised under the Act upon the surrender of an existing lease though an underlease granted by the surrendering lessee is unexpired, *Re Ford*, L. R. 8 Eq. 309. To take effect in possession.

(*f*) Building leases are to include *repairing leases*, but no repairing lease is to be made for a term exceeding sixty years, see sect. 2 of 27 & 28 Vict. c. 108, the Amendment Act, 1858, p. 255, *post*. Repairing leases.

(*g*) *Duke of Bedford* v. *Marquis of Abercorn*, 1 M. & C. 312.

(*h*) *In Re Cross's Charity*, 27 Beav. 592, the trustees of a dissenting chapel at St. Helen's, in the county of Lancaster, presented a petition praying that power to grant building leases of property in that place for any term not exceeding 600 years might be vested in them. The Master of the Rolls, on proof that it was customary to grant building leases for 999 years of land in the neighbourhood of St. Helen's, authorised the endorsement of a power to grant such a lease for 600 years on a deed declaring the trusts of a dissenting chapel. But it seems from *Re Carr's Settled Estates*, 9 W. R. 776, that before the Court will authorise the granting of building leases for 999 years, it will require evidence not only that such granting was according to the custom of the country, but also that the land could not be beneficially let on other terms. Long building leases. 600 years. 999 years.

The power given to the Court by this section of granting leases for larger terms than those thereby prescribed, is extended to all leases except agricultural leases, see sect. 4 of the Amendment Act, 1858, p. 256, *post*.

(*i*) The Act cannot be resorted to for the purpose of carrying out leases based on contracts by a testator, unless such contracts fall within the express terms of the Act; and where the contracts were for leases of parts of the testator's estate for building purposes, and provided for the granting of separate leases of the houses when built, apportioning the whole ground rent among some of them, and leaving the rest to be demised at a peppercorn rent, this was not held the best rent, *Cust* v. *Middleton*, 3 D. F. J. 33. Though the new lease is to be at the "best rent, &c.," yet the value of surrendered leases may be taken into consideration in regulating the terms of the new lease, *Re Rawlins*, L. R. 1 Eq. 286, see sect. 5, *infra*. "Best rent."

(*j*) In a proper case a lease of mines will be allowed to include a lease of so much land as may appear necessary for the convenient and effective working of the minerals, *Re Reveley*, 11 W. R. 774. And power for the lessor to grant way-leave licenses may be inserted, *Re Wallace*, W. N. 1869, 66. Mining leases.

(*k*) See sect. 23, *post*, and notes to sect. 69 of the Lands Clauses Act, *ante*, p. 36.

III. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise (*l*). Leases may contain special covenants.

(*l*) As to "usual covenants" in a lease, see Davidson, Vol. V. Usual covenants.

19 & 20 Vict. c. 120, s. 4.

IV. The power to authorise leases conferred by this Act shall extend to authorise leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Parts of settled estates may be leased.

Leases may be surrendered and renewed.

V. Any leases *granted under this Act* (*m*) may be surrendered, either for the purpose of obtaining a renewal of the same or not; and the power to authorise leases conferred by this Act shall extend to authorise new leases of the whole or any part of the hereditaments comprised in any surrendered lease.

21 & 22 Vict. c. 77, s. 5.

(*m*) The power conferred by this section is by s. 5 of the Amendment Act, 1858, *post*, p. 236, extended to all leases, whether granted under this Act or otherwise.

Power to authorise leases to extend to preliminary contracts.

VI. The power to authorise leases conferred by this Act shall extend to authorise preliminary contracts to grant any such leases; and any of the terms of such contracts may be varied in the leases.

Mode in which leases may be authorised.

VII. The power to authorise leases conferred by this Act may be exercised by the Court, either by approving of particular leases, or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned (*n*).

(*n*) See note to sect. 10, *infra*.

What evidence to be produced on an application to authorise leases.

VIII. When application is made to the Court, either to approve of a particular lease, or to vest any powers of leasing in trustees, the Court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorised.

After approval of a lease, Court to direct who shall be the lessor.

IX. When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by

the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the Court shall direct. 19 & 20 Vict. c. 120, s. 9.

Powers of leasing may be vested in trustees.

X. Where the Court shall deem it expedient that any general powers of leasing any settled estates conformably to this Act should be vested in trustees, it may by order vest any such power accordingly, either in the existing trustees of the settlement or in any other persons; and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorise the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid (*o*).

(*o*) It is now provided that in orders to be made under this section, no condition shall be inserted that the lease is to be settled by the Court (except where the parties desire it, or the Court thinks it necessary), and that such conditions, if already inserted, may be struck out by the Court. See ss. 1, 2, of the Amendment Act, 1864, p. 238, *post*. Leases how to be settled.

Before this enactment it was considered that in all cases where trustees were empowered to grant leases, each separate lease, or one model lease, must be settled in chambers, *Re Procter*, 5 W. R. 643; *Re Earl of Jersey*, 9 W. R. 609; but now except in special cases, no form of lease need be settled in chambers, see *Re Dorning*, 14 W. R. 125; *Re Hoyle*, 12 W. R. 1125. Not necessarily in chambers.

As to the employment of the conveyancing counsel of the Court in cases where the lease is directed to be settled in chambers, see 15 & 16 Vict. c. 80, s. 40, p. 133, *ante*, and note. In such cases a model lease will, where expense may thus be saved, be directed to be settled and adopted for each lease, without the necessity of applying to chambers in every case (*Re Hemingway*, 7 W. R. 279, where the following order was made: "It is ordered that the general powers of leasing the estates in the petition mentioned, subject to the provisions and restrictions in the Act contained, be vested in and in the petition mentioned, such powers to be exercised with the consent in writing of and such leases to be in such terms and conditions, and to contain such covenants, conditions, and stipulations, as shall be approved of by the judge to whose Court this case is attached"). It has been suggested that under this order the proceeding would be as follows: the parties would, by an affidavit of the surveyors employed, state the terms and conditions upon which it was proposed to grant the leases, and the intended covenants, conditions, and stipulations would also be stated, and a certificate approving of those particulars would answer every purpose; thus, the minimum rent per Reference to conveyancing counsel.

19 & 20 Vict. c. 120, s. 10.

foot, the class of houses, the period to be allowed for building, the nature of the covenants for repairing, insuring, &c., would all be settled. This being done with care would render any further application unnecessary, unless a very different class of lease was required: See, too, as to model leases, *Re Chambers*, 28 Beav. 653; 8 W. R. 646; *Re Earl of Jersey*, 9 W. R. 609; *Attorney-General* v. *Christ Church, Oxford*, 3 Giff. 514. And as to model conveyances on sales, *Re Eyre*, 4 K. & J. 268.

In case the parties differ.

In *Re Sheffield*, W. N. (1876) 152, the words "in case the parties differ" were allowed to be inserted.

Court may authorise sales of settled estates, and of timber.

* See Judicature Act, 1873, s. 34 (2), *post*.

XI. It shall be lawful for the Court of Chancery* in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale (*p*) of the whole or any parts of any settled estates (*q*) or of any timber (not being ornamental timber) (*r*) growing on any settled estates; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.

Who may petition. Sales how sanctioned.

(*p*) As to who may petition, see sect. 16, *infra*.

The Court will not sanction sales indefinitely, but only those mentioned in the petition, and any others which the Court shall be satisfied with as being beneficial. *Re Peacock*, 15 W. R. 100.

Form of prospective order.

For form of order, see *Re Roper*, 2 N. R. 442; *Re Hilton*, 14 L. T. N. S. 129; when the Court referred the matter to chambers, and directed that if it should appear by the certificate that it was fit and proper, &c., that the petitioner should be purchaser of the property, a conveyance should be made to that effect; and see note (*g*), *ante*, p. 39, as to "prospective orders."

Sales of mines apart from surface.

(*q*) It is clear that the Act authorises a sale of mines apart from the surface, *Re Mallin*, 3 Giffard, 126, 9 W. R. 588; *Re Law*, 7 Jur. N. S. 511; *Re Milward*, L. R. 6 Eq. 248. Under an ordinary power of sale this could not be effected, *Buckley* v. *Powell*, 7 Jur. N. S. 536; but see now the Confirmation of Sales Act, p. 268, *post*.

"Ornamental timber."

(*r*) As to the meaning of "ornamental timber," see *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 107; *Lord Mahon* v. *Lord Stanhope*, 3 Mad. 523, n.; *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; *Hallewell* v. *Phillips*, 6 W. R. 408.

Consideration for land sold for building may be a fee-farm rent.

XII. When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve.

19 & 20 Vict. c. 120, s. 13.

Minerals, &c., may be excepted from sales.

XIII. On any sale of land, any earth, coal, stone, or mineral may be excepted and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenant, or submit to any restrictions, which the Court may deem advisable.

Court may authorise dedication of parts of settled estates for roads, &c.

XIV. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out (*s*) for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to and vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable (*t*).

Plans of roads, &c.

(*s*) The Court will not always require plans to be laid before it, *Re Hargreave*, 15 W. R. 54.

Expense of roads.

(*t*) The Court would not sanction the expenditure of proceeds of sale of part of the estate, in making roads, *Re Chambers*, 28 Beav. 653; *Re Hurle*, 2 H. & M. 196. *Re Venour*, L. R. 2 Ch. Div. 522; 45 L. J. Ch. 409; but see now the Amendment Act of 1876, s. 1, p. 242, *post*.

Amendment Act, 1876.

But a building lease may be granted to a lessee in consideration of his undertaking to make the roads, *Re Chambers*, 28 Beav. 655.

How sales and dedications are to be effected under the direction of the Court.

XV. On every sale or dedication to be effected as hereinbefore mentioned, the Court may direct what person or persons shall execute the deed of conveyance (*u*), and the deed executed by such person or persons shall take effect as if the settlement had contained a power (*v*) enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise, as the Court shall direct (*w*).

Who is to execute conveyance.

(*w*) Where the legal estate of property ordered to be sold was vested in eleven persons, it was held that the Court had no power to direct that one

19 & 20 Vict. c. 120, s. 15.

of those persons should execute the conveyance for all. *Re Holly*, W. N. (1868) 70.

(*v*) Even when there is a power of sale in the instrument, the Court may direct a sale under the Act, *Re Thompson*, Johnson, 418. See *Re Morgan*, L. R. 9 Eq. 587. sect. 26, *post*.

Legal estate bound by sale.

(*w*) Where an order was made for sale, under the Act, of lands the legal estate in which was outstanding in a mortgagee, and by a subsequent order it was directed that the mortgagee and other parties should be bound by the former order, it was held that a sale by the nominee of the Court bound the legal estate, which subsequently to the sale had been reconveyed by the mortgagee to the trustees of the settlement (*Eyre* v. *Saunders*, 7 W. R. 366; and see 4 Jur. N. S. 830; and *Re Wilkinson's Trust*, cited note (*h*), p. 97, *ante*).

Application by petition to exercise powers conferred by this Act.

XVI. Any person entitled to the possession or to the receipt of the rents and profits of any settled estates (*x*) for a term of years determinable on his death, or for an *estate for life* (*y*) or any greater estate, may apply to the Court, by petition (*z*), in a summary way to exercise the powers conferred by this Act.

Incumbrancers.

(*x*) A tenant for life cannot petition when the legal estate is outstanding in trustees, unless the trustee joins, *Ex parte Ruxley*, L. R. 2 Ir. Eq. 237; see *Taylor* v. *Taylor*, L. R. 20 Eq. 297, 1 C. D. 426, W. N. (1875), 186, 231; but the consent of incumbrancers is not necessary, though without such concurrence their estates and interests are not affected, see sect. 41, p. 233, *post*, and compare note (*l*), p. 40; and note (*y*), p. 46, *ante*.

"Estate for life."

(*y*) When a testator leaves property to his widow during her life or widowhood, she and the persons entitled in remainder may apply to the Court under this section (*Williams* v. *Williams*, 9 W. R. 888).

Form of petition, &c.

(*z*) See Cons. Ord. XLI. 14, 15, *post*.

Setting down.

The petition must not be set down for hearing until after the expiration of twenty-one days from the publication of the last of the advertisements, directed to be made by the 20th section of the Act, see Cons. Ord. XLI. 20, *post*.

It seems that a petition is necessary, even though a suit be pending (*Harvey* v. *Clark*, 25 Beav. 7). See note (*c*) to sect. 3 of Infants' Settlement Act, p. 213, *ante*.

Cons. Ord. XLI.

Cons. Ord. XLI. r. 14, 15, provides as follows:

Rule 14. Name, &c., of and place for service on petitioner.

14. *Every petition under the Act, and every public and private notice required by the Act, shall set forth the name, address, and description of the petitioner, and also a place in London, Westminster, or the borough of Southwark, or within two miles from the Record and Writ Clerks' Office, where he may be served with any order of the Court or of the judge in chambers, or notice relating to the subject of the petition.*

If the address appears in the body of the petition it is sufficient, *Re Burley*, 18 L. T. N. S. 450.

Rule 15. Title of peti-

15. *All petitions and notices, and also all affidavits and*

other proceedings under the Act, shall be entitled in the matter of the Act, and in the matter of the property in question, mentioning the county and parish or place in which it is situate, and describing it by general terms, and every such petition shall be marked with the words "Master of the Rolls," or with the title of the Vice-Chancellor before whom it is intended to be heard.

19 & 20 Vict. c. 120, s. 16.

tions, &c., under the Act

See *Re Burnley*, W. N. (1875), 58; *Re Helmsley*, L. R. 16 Eq. 315; *Re Marezzo Marble Company*, W. N. (1874), 9, as to slight errors.

The particular settlement need not be specified, if the property is sufficiently identified, and shown to be under settlement (*Re Thompson*, Johns. 418.

Title of petition, &c.

XVII. Subject to the exception contained in the next section, every application to the Court must be made with the concurrence or consent of the following parties, namely (*a*),

With whose consent such application to be made.

Where there is a tenant in tail under the settlement in existence, and of full age, then the parties to concur or consent shall be such tenant in tail, or if there is more than one such tenant in tail then the first of such tenants in tail, and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement (*b*), and also all trustees having any estate or interest on behalf of any unborn child.

(*a*) As to applications for re-investment not requiring this concurrence, see note (*p*) to sect. 24, p. 228, *infra*.

See now as to consents, 37 & 38 Vict. c. 33 (Amendment Act, 1874), *post*, p. 240.

Where land was settled in remainder on such person as should be the heir of A, it was held that an order could be made under the Act which would bind such person, *Beioley* v. *Carter*, L. R. 4 Ch. 230.

(*b*) Cons. Ord. XLI. r. 22, provides as follows:

Cons. Ord. XLI. r. 22.

22. *On every application under the Act for authority to sell, the Court must be satisfied by sufficient evidence who are the parties interested in the estate, whose consent is*

Rule 22. Evidence of parties interested, and

19 & 20 Vict. c. 120, s. 17.

required by the Act, and what are the circumstances which render the proposed sale proper and expedient.

propriety of sale.

Persons interested under a settlement, down to the first tenant in tail, must be served, *Re Bolton Estates*, 24 L. T. N. S. 86.

Service.

Parties beneficially interested under the trusts of a term for raising *portions* must be served (*Re Broughton*, 12 W. R. 34; and see *Re Turbutt*, cited in note (*x*), p. 253, *post*; *Re Strutt*, L. R. 16 Eq. 629, 43 L. J. Ch. 69, as to parties with an unascertainable interest.

Trustees with powers of sale are treated as beneficial owners.

Where trustees have power to give receipts for the monies payable (see 22 & 23 Vict. c. 35, s. 23, p. 278, *post*), their consent to the sale is sufficient (see note (*d*), p. 104, *ante*, and the cases there cited, and comp. *Ellison* v. *Cookson*, 2 Coll. 52; *Eyre* v. *Saunders*, 4 Jur. N. S. 380). So in a later case before the Master of the Rolls (*Grey* v. *Jenkins*, 26 Beav. 351), it was held that though trustees could only consent for unborn children, yet trustees *with a power of sale* might join in a sale which would be binding on all persons claiming under them, they being for this purpose treated just as if they were beneficial owners (see 26 Beav. 357); compare *Re Potts*, L. R. 16 Eq. 631 (n), 15 W. R. 29, with *Fryer* v. *Morland*, W. N. (1876) 244.

Consent withheld.

If the requisite *consent* is withheld, the order could not formerly have been made, however beneficial the proposed lease might prove to the estate, *Re Merry's Estate*, 15 W. R. 307; see *Re Hurle's Settled Estate*, cited note (*y*), p. 221, *ante*; *Re Hutchinson*, 14 W. R. 473. But see now the 37 & 38 Vict. c. 33, sect. 3, p. 240, *post*, which gives the Court power to dispense with the consent under certain circumstances; but *notice* must be given under that act, *Re Bylar*, 24 W. R. 949.

Petition may be granted without consent, saving rights of non-consenting parties.

XVIII. Provided nevertheless, that unless there shall be a person entitled to an estate of inheritance whose consent or concurrence shall have been refused or cannot be obtained, it shall be lawful for the Court, if it shall think fit, to give effect to any petition, subject to and so as not to affect the rights, estate, or interest of any person whose consent or concurrence has been refused or cannot be obtained, or whose rights, estate, or interest ought in the opinion of the Court to be excepted (*c*).

Where difficult to obtain concurrence of all.

(*c*) Where there were a number of legatees having charges on a settled estate, and it was almost impossible to serve them all, the Court made an order without requiring them to be served, but inserted the following words in the order—"subject to and so as not to affect the rights, estate, and interest of any persons whose consent and concurrence could not be obtained," *Re Legge*, 6 W. R. 20; *Re Parry*, 34 Beav. 462; and the Court dispensed with the concurrence of a lunatic not so found by inquisition, who had a right to a definite annual sum out of the settled property, *Re Turbutt's Settled Estate*, 8 L. T. N. S. 603. See *Re Franklin* 7 W. R. 45. The examination of a married woman, whose interest was remote and was represented by trustees, was dispensed with, *Re Lord de Tabley*, 11 W. R. 936. See now 37 & 38 Vict. c. 33, sect. 3, *post*, p. 241.

Of lunatic.

Feme covert having remote interest.

Notice of application to be served on all trustees, &c.

XIX. Notice of any application (*d*) to the Court under this Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of

the Court ought to be so served (*e*), unless the Court shall think fit to dispense with such notice. 19 & 20 Vict c. 120, s. 19.

(*d*) See Cons. Ord. XLI. 14, 15, p. 222, *ante*.
As to service of applications for re-investment, see note to sect. 24, p. 228, *infra*.

(*e*) The petition must not be brought on merely to obtain the opinion of the Court as to service, *Re Green*, 6 Jur. N. S. 530, 8 W. R. 403.

XX. Notice of any application (*f*) to the Court under this Act shall be inserted in such newspapers as the Court shall direct (*g*), and any person or body corporate, whether interested in the estate or not, may apply to the Court of Chancery by motion (*h*) for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think fit. Notice of application to be given in newspapers. Motion to be heard in support or opposition.

(*f*) See notes (*y*) and (*b*) on last page.

(*g*) Cons. Ord. XLI. r. 16 provides that— Cons. Ord. XLI. r. 16. Rule 16. Advertisements.

16. *After any such petition has been presented, application may be made ex parte and in chambers to the judge before whom it is intended to be heard, for directions in what newspapers the notices required by the Act are to be inserted.*

See 23rd Regul. as to business, p. 173, *ante*.

Slight errors in the advertisements have been disregarded in *Re Bateman*, 13 W. R. 513; but see *Re Nunc*, W. N. (1867) 109; *Re Whitely*, L. R. 8 Eq. 574; *Re Snell*, 19 W. R. 1000; *Re Helmsley*, L. R. 16 Eq. 315, 29 L. T. N. S. 173; *Re Burley*, 18 L. T. N. S. 450 W. N. (1868) 148, where the address of a next friend was omitted in advertisements, *Re Bicknell*, L. R. 14 Eq. 467. Form of advertisements.

See as to advertisements being inserted for successive weeks, *Re Monkton Farleigh Estate*, 4 N. R. 221.

But where a leasing power had been granted to a tenant for life who died, and a petition was presented by the succeeding tenant for life and her husband, praying that the power might vest in one of the trustees of the will under which she claimed, it was held, under the circumstances, that the advertisements need not be repeated (*Re Kentish Town Estate*, 1 J. & H. 230); and see *Re Bunbury*, 13 W. R. 370; *Re Horton*, 34 Beav. 386, where an infant remotely interested was born after advertisements had been issued, and the Court allowed him to be made a party by amendment, and dispensed with further advertisements. Repeating advertisements.

So when the petition was directed to be formally amended, but not so as to make a material change, the advertisements had not to be repeated, *Ex parte Puxley*, L. R. 2 Ir. Eq. 237; see *Wheeler* v. *Tootel*, 16 W. R. 273; *Re Wilkinson*, W. N. (1873) 78.

19 & 20 Vict. c. 120, s. 20.

(*h*) Cons. Ord. XLI. (r. 17—19) provides as follows :—

Rule 17. Time for motions.

17. *Motions under the 20th section of the Act may be made ex parte, within seven clear days after the publication of the advertisement which may be last inserted in the newspaper, but not later, except by special leave of the Court; and every order made on any such motion must be served on the petitioner within four days after the making thereof.*

Service of order thereon.

Motions for leave to appear in support or opposition.

In bespeaking the order, the newspapers containing the advertisements, and any interlocutory orders which may have been made relating thereto, must be left with the Registrar (33rd Regul. as to business, March, 1860). Some reason must be assigned for special leave to move later (*Re Merry*, 14 W. R. 665).

Rule 18. Application for copy of petition how made.

18. *If the person obtaining such order shall require a copy of the petition, such person shall, at the time of serving such order, make a written application to the petitioner for such copy, with an undertaking to pay all proper charges for the same.*

Rule 19. Delivery and payment of copy.

19. *Within two clear days after such application, a copy of the petition shall be ready to be delivered, and shall be delivered on demand, and on payment for the same, after the rate of fourpence per folio.*

Compare Additional Orders, Aug., 1875 (pt. II. *post*), as to copies, and the costs of them.

Rule 20. Petition when heard.

20. *No petition under the Act shall be set down for hearing until after the expiration of twenty-one days from the publication of the last of the advertisements.*

Hearing.

The proper course is not to apply specially as soon as the advertisements have been inserted, that the petition may be in the paper on a particular day, but to get a certificate from the Lord Chancellor's secretary that they have been duly issued, when the petition will come into the paper as a matter of course, without further application (*Re Blake*, 8 W. R. 539).

When speeded.

In *Re Mallin*, 3 Gif. 126, an application to set down the petition before the twenty-one days had elapsed was refused by the Lord Chancellor ; but where the petition would otherwise have been thrown over the long vacation, a similar application was granted, *Re Adam*, 6 L. T. N. S. 604. See *Re Bower*, 18 W. R. 1085 ; *Re Greville*, W. N. (1871) 180 ; *Re Taylor*, L. R. 14 Eq. 557 ; *Re Townsend*, L. R. 14 Eq. 433.

No application under this Act to be granted where a simi-

XXI. The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to

either House of Parliament for a private Act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred (*i*). 19 & 20 Vict. c. 120, s. 21.

Similar application has been rejected by Parliament.

(*i*) If the bill has been rejected the Court will presume, until the contrary has been shown, that it was rejected on the merits (*Re Wilson's Estates*, 1 L. T. N. S. 25). Application to Parliament.

Cons. Ord. XLI. r. 21, provides that—

21. *Upon every application under the Act, the Court must be satisfied by sufficient evidence that no such previous application to Parliament as is mentioned in the 21st section of the Act has been made and rejected, or reported against.* Cons. Ord. XLI. Rule 21. How Court must be satisfied.

XXII. The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this Act shall be placed on the settlement or on any copies thereof (*k*), or otherwise recorded in any way it may think proper, in all cases where it shall appear to the Court to be practicable and expedient, for preventing fraud or mistake. Notice of the exercise of powers to be given by the Court.

(*k*) The documents on which the notice is to be indorsed are to be specified in the order, Cons. Ord. XLI. 24, which rule also provides that the judge may require that the documents so indorsed shall be produced in Court for his inspection, and in a Register County may order a duplicate or memorial of them to be filed. See in the case of charity land, *Attorney-General* v. *Christchurch*, 3 Giff. 515. Cons. Ord. XLI. r. 24.

XXIII. All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the Court shall think fit, be paid to any trustees (*l*) of whom it shall approve, or otherwise the same shall be paid into the Bank of England or Ireland, as the case may be, to the account of the Accountant-General of the Court of Chancery, *ex parte* the applicant in the matter of this Act, and in either case such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes (namely): Court may appoint trustees to receive and apply monies arising from sales.

The purchase or redemption of the land tax, or the

19 & 20 Vict. c. 120, s. 23.

discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid; or, affecting any other hereditaments subject to the same uses or trusts; or,

The purchase of other hereditaments (*m*) to be settled in the same manner (*n*) as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled (*o*).

(*l*) See *Aston* v. *Meredith*, L. R. 13 Eq. 492.

Application of sale monies.

(*m*) The money cannot be laid out in any other way except in new buildings, though permanent improvements were sanctioned in *Re Clitheroe*, 17 W. R. 345, 20 L. T. N. S. 6; *Re Newman*, L. R. 9 Ch. 681 (see note, p. 36, *ante*); but such new buildings may be either bought or erected, see *Drake* v. *Trefusis*, L. R. 10 Ch. 364; *Re Venour*, L. R. 2 Ch. Div. 522, 45 L. J. Ch. 409.

New trustees.

(*n*) Where there was no existing trustee of settled estates which had been directed to be sold, the Court ordered new trustees to be appointed, and the lands purchased with the proceeds to be conveyed to them, *Re Sexton Barn*, 10 W. R. 416.

Investment.

Where a will contained a trust for sale not immediately exerciseable, on the petition of the tenant for life, the remainderman consenting, the Court ordered part of the proceeds of the sale under the Act to be invested in mortgage security, *Wall* v. *Hall*, 11 W. R. 298; see *Re Morgan*, L. R. 9 Eq. 587; *Re Helmsley*, 43 L. J. Ch. 72.

Lands Clauses Act.

(*o*) See as to dispensing with a disentailing deed, and generally as to the application of the cases under s. 69 of the Lands Clauses Act, *Re Wood*, 20 L. R. Eq. 372.

Cases without application to Court.

XXIV. The application of the money in manner aforesaid (*p*) may, if the Court shall so direct, be made by the trustees (if any) without any application to the Court (*q*), or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Reinvestment.

(*p*) Upon an application for the re-investment of money under this section, it is not necessary to serve the persons who were required to be served with all the notices required on a petition for sale (*Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 481; approved in *Re Sexton Barn*, 10 W. R. 416).

(*q*) See *Re Peacock*, 15 W. R. 100.

Until money can be applied, to be invested, and dividends to be paid to parties entitled.

XXV. Until the money can be applied as aforesaid (*r*), the same shall be from time to time invested in Exchequer Bills, or in Three per Centum Consolidated Bank Annuities (*s*), as the Court shall think fit: and the interest and dividends of such Exchequer Bills or Bank

Annuities shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land. 19 & 20 Vict. c. 120, s. 25.

(*r*) Purchase moneys have in some instances been allowed to be invested in the securities authorised by the settlement by consent of the tenant for life and persons entitled in remainder, see note (*n*) last page, and *Re Morgan*, there cited.

(*s*) Some judges hold that moneys in Court under this Act may be invested as "cash under the control of the Court," under 23 & 24 Vict. c. 38, in any of the securities allowed by Ord. I., Feb. 1861, *Re Cook*, L. R. 12 Eq. 12; *Re Wilkinson*, L. R. 9 Eq. 343; *Re Thorold*, L. R. 14 Eq. 31; *Re Taddy*, L. R. 16 Eq. 532; but see *Re Boyd*, there cited, and *Re Shaw*, L. R. 14 Eq. 9; *Re Fryer*, L. R. 20 Eq. 468.

XXVI. The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not: but no such powers shall be exercised if an express declaration or manifest intention that they shall not be exercised is contained in the settlement, or may reasonably be inferred therefrom (*t*), or from extrinsic circumstances or evidence: Provided always that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended. Court may exercise powers repeatedly, but may not exercise them if expressly negatived. [Where settlement contains *similar* power.]

(*t*) The existence of a power of sale in the settlement is not a sufficient manifestation of intention within this section to preclude the Court from ordering a sale under the Act, *Re Thompson*, Johns. 424; and see *Grey* v. *Jenkins*, 26 Beav. 351; *Re Morgan*, L. R. 9 Eq. 587. Lease ordered though settlement contained power to sell.

Where a power is only to be exercised with certain consent, the Court will not dispense with such consent, even though it be arbitrarily (but not maliciously) refused, *Re Hurle*, 2 H. & M. 196, and see note (*b*), p. 223. Consent.

XXVII. Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors. Court not to authorise any act which could not have been authorised by the settlor.

XXVIII. After the completion of any lease or sale, or other act, under the authority of the Court, and purporting to be in pursuance of this Act, the same shall Acts of the Court in professed pursuance of this

19 & 20 Vict. c. 120, s. 28.

Act, not to be invalidated.

not be invalidated on the ground that the Court was not hereby empowered to authorise the same; except that no such lease, sale, or other act shall have any effect against any person whose concurrence in or consent to the application ought to have been obtained, and was not obtained (*u*).

Effect of conveyance.

(*u*) See *Re Thompson*, Johns. 422; *Beioley* v. *Carter*, L. R. 4 Ch. 230; *Re Shepheard*, L. R. 8 Eq. 571.

Costs.

XXIX. It shall be lawful for the Court, if it shall think fit, to order that all or any costs (*x*) or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement, and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct.

Costs.

(*x*) As to the costs of applications intended to benefit estates to which different persons are successively entitled, see *Re Parby*, 29 L. T. 72; and and see *Re Marner*, cited p. 69, *ante*, and note (*l*), *ante*, p. 109.

[Sections XXX., XXXI. give power to Lord Chancellor, &c., to make rules and orders.]

Tenants for life, &c., may grant leases for twenty-one years.

XXXII. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life, or for a term of years determinable with his life, or for any greater estate, either in his own right or in the right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the courtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion-house and demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years to take effect

in possession, provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period not less than twenty-eight days of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained; and provided a counterpart of every deed of lease be executed by the lessee (*y*). 19 & 20 Vict. c. 120, s. 32.

(*y*) A tenant for life under a devise, where the trustees had all powers of management, is not within the section, *Taylor* v. *Taylor*, L. R. 20 Eq. 297, S. C. 1 Ch. Div. 426, 432.

XXXIII. Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled, and in the case of unsettled estates against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same (*z*). Against whom such leases shall be valid.

(*z*) Such leases are now, by the 21 & 22 Vict. c. 77, s. 8, p. 237, *post*, valid, "against the wife of any husband making such demise of estates to which he is entitled in right of his wife." Leases valid against wife.

XXXIV. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act. Evidence of execution of lease by lessee.

[Section XXXV. repeals 32 Hen. 8, c. 28, and 10 Car. 1, sess. 3, c. 6.]

XXXVI. All powers given by this Act, and all applications to the Court under this Act, and consents to such applications, may be exercised, made, or given by guardians on behalf of the infants (*a*), and by committees on behalf of lunatics (*b*), and by assignees of bankrupts or insolvents: Provision as to infants, lunatics, &c.

19 & 20 Vict. c. 120, s. 36.

Provided nevertheless, that in the cases of infant or lunatic tenants in tail no application to the Court, or consent to any application, may be made or given by any guardian or committee without the special direction of the Court (*c*).

Guardian how and when appointed.

(*a*) As to appointing a guardian to apply or consent by summons in chambers and the evidence required, see 21st Regul. as to business, Aug. 8, 1857, p. 172, *ante, post.* In case the guardian has to *apply* he must be appointed before the petition is *presented*, *ibid.*; but see *Re Hargreave*, 7 W. R. 156, where it was held that the guardian may be appointed *at any time before the petition is heard*; *Re Longstaffe*, 1 Drew. & Sm. 142; and see the cases cited in note (*d*), *infra*.

Where the guardian has only to *consent* to an application, he may be appointed either before or after the petition is presented. *Re Hargreave*, loc. cit. A special guardian must be appointed even though the father of the infant having no adverse interest concurs (*Re Caddick's Settled Estates*, 7 W. R. 334), and although there is a testamentary guardian, *Re James*, L. R. 5 Eq. 334, and compare *Re Marquis of Salisbury*, L. R. 2 C. D. 29.

(*b*) As to lunatics not so found, see *Re Clough*, L. R. 15 Eq. 284, where it was held (overruling *Re Venner*, L. R. 6 Eq. 249) that the Court had in such a case no power to appoint a guardian for the purposes of the suit.

Cons. Ord. XLI. 23.

(*c*) Such special directions may be obtained by *ex parte* summons, Cons. Ord. XLI. 23; see p. 147, *ante*. See 22nd Regul. as to business, Aug. 8, 1857, p. 172, *ante*, and *Re Woodcock*, L. R. 3 Ch. 229.

A married woman applying to the Court to be examined apart from her husband.

XXXVII. Where a married woman shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined apart from her husband (*d*), touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband, or not; and no clause or provision in any settlement restraining anticipation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

No clause, &c., in settlement restraining anticipation to prevent Court from exercising powers of this Act.

When married women should be examined.

(*d*) A married woman petitioning should be examined before any judicial step is taken, and as to the attestation, see *Re Lewis*, 24 W. R. 103; the Court refused to dispense with the examination in *Re Johnson*, W. N. (1869) 87; *Re Broadwood*, L. R. 7 Ch. 323; but see *Re Halliday*, 12 L. R. Eq. 199; *Re Thorne*, W. N. (1872) 93, where the married woman resided abroad, *Re Peeke*, W. N. (1871) 170, where the married woman was petitioner; where a married woman's interest was remote, and she was represented by trustees, her examination was dispensed with, *Re Lord de Tabley*, 11 W. R. 936; *Re Tibbett*, 17 W. R. 394.

A married woman *consenting* to an application may be examined under this section at any time up to the hearing of the petition, or her consent may be taken in court on the petition coming on to be heard, and advertisements issued previously to the obtaining such consent are therefore valid, *Re Forster*, 24 Beav. 220, 1 De G. & J. 386 12 & 20 Vict. c. 120, s. 37.

When a woman married after the petition was presented, but before any proceedings were taken under it, the Master of the Rolls held that she must be examined under this section (*Re Cundee*, Nov. 11, 1859), *Re Marshall*, L. R. 15 Eq. 66.

In *Re Turbut*, 8 L. T. N. S. 657 (where it was held that a married woman entitled to a *jointure* charged on settled estates must be examined under this section), her examination was ordered after the order was made upon the petition, but before it was drawn up, the petition being ordered to be mentioned again after the examination. After order made.

XXXVIII. The examination of such married woman shall be made either by the Court or by some solicitor (*e*) duly appointed by the Court for that purpose (*f*), who shall certify, under his hand, that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. Such examination to be either by the Court or by a solicitor.

(*e*) The solicitor appointed to take the examination should not be the solicitor acting in the matter (*Re Brealy's Settled Estates*, 5 W. R. 613 ; and cf. *Hopkin* v. *Hopkin*. 10 Hare, App. ii.), or the solicitor of the husband (*Re Noyes' Settled Estates*, 6 W. R. 7) ; and no person connected with the husband should be allowed to be present during the examination (*Re Bendyshe*, 3 Jur. N. S. 727). He must be a solicitor actually taking out a certificate *de anno in annum*, although he may be practising in a foreign country (*ibid*). It is now provided that when the married woman *resides abroad*, any person, whether a solicitor or not, may be appointed. See sect. 6 of the Amendment Act, 1858, p. 236, *post*. Who may take her examination.

(*f*) The section does not authorise a commission (*Re Noyes' Settled Estates*, 6 W. R. 7; and see *Turner* v. *Turner*, 6 W. R. 95).

XXXIX. Subject to such examination as aforesaid married women may make or consent to any applications, whether they be of full age or infants (*g*). As to consent of married women under age.

(*g*) See *Re Broadwood*, L. R. 7 Ch. 323.

XL. Nothing in this Act shall be construed to create any obligation at law or in equity on any person to make or consent to any application to the Court, or to exercise any power. No equity to compel any one to apply to the Court.

XLI. For the purposes of this Act, a person shall be deemed to be entitled to the possessions or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by Tenants for life, &c., may exercise powers notwithstanding incumbrances.

19 & 20 Vict. c. 120, s. 41.

the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein.

Exceptions as to entails created by Acts of Parliament.

XLII. Provided always, that nothing in this Act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in which under the Act of the twenty-fourth and twenty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King is in reversion," or under any other Act of Parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

Saving rights of lords of manors.

XLIII. Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

To what settlements this Act to extend.

XLIV. The provisions of this Act shall extend to all settlements, whether made before or after it shall come in force, except those as to demises to be made without application to the Court, which shall extend only to settlements made after this Act shall come in force.

Extent of Act.

XLV. This Act shall not extend to Scotland.

Commencement of Act.

XLVI. This Act shall come in force on the first day of November, one thousand eight hundred and fifty-six.

Cons. Ord. XLI. r. 25. Fees and Allowances.

Cons. Ord. XLI. r. 25 *provides that the fees and allowances to all officers and solicitors of the Court, in respect of matters under the Act, shall be such fees and allowances as by the practice of the Court* * *and Orders XXXVIII. and XXXIX. they are allowed to take and charge for business of a similar nature.*

* See now orders as to fees and costs, Pt. II., *post.*

LEASES AND SALES OF SETTLED ESTATES AMENDMENT ACT, 1858.

21 & 22 VICT. CAP. 77.

An Act to amend and extend the settled Estates Act of 1856. [*2nd August*, 1858.

WHEREAS it is expedient to amend and extend the Settled Estates Act of 1856 (nineteenth and twentieth Victoria, chapter one hundred and twenty) in certain particulars: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: 21 & 22 Vict. c. 77. 19 & 20 Vict. c. 120.

Definitions of "Settlement" and "Settled Estates."

I. For the purposes of the definitions of "settlement" and "settled estates" contained in the first section of the said Act, all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor, or descending to the heir of a testator, shall be deemed to be estates, coming to such settlor or heir under or by virtue of the settlement (*a*).

(*a*) See note (*c*), p. 215, *ante*.

"Building lease" to include repairing lease.

II. The term "building lease" in the said Act (*b*) shall be deemed to include a repairing lease, so that no repairing lease shall be made for a term exceeding sixty years (*b*).

(*b*) See note (*f*), p. 217, *ante*.

Powers of leasing to extend to copyhold and customary tenants of manors.

III. All the powers to authorise and to grant leases contained in the said Act and this Act shall be deemed to include powers to the lords of settled manors to give licences to their copyhold (*c*) or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be

21 & 22 Vict. c. 77, s. 3.

authorised or granted of freehold hereditaments under the said Act and this Act.

(*c*) See note (*e*), p. 215, *ante*.

Extension of power under section 2 of recited Act as to term for building leases.

IV. The power given to the Court by the second section of the said Act to extend the term thereby prescribed for building leases, where it shall be satisfied that it is the usual custom of the district, and beneficial to the inheritance, to grant building leases for longer terms, shall be extended and may be exercised with respect to all the other leases in the same section mentioned, except agricultural leases, provided the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such leases for longer terms (*d*).

(*d*) See note (*h*), p. 217, *ante*.

As to surrender of leases.

V. The power conferred by the fifth section of the said Act to surrender leases granted under the provisions of the said Act shall be deemed to extend to all leases, whether granted in pursuance of the said Act or otherwise (*e*).

(*e*) See note (*m*), p. 218, *ante*.

As to taking examinations of married women.

VI. Whenever a maried woman is resident out of the jurisdiction of the Court of Chancery of England or the Court of Chancery of Ireland respectively, as the case may be, her examination, under the thirty-eighth section of the Act, may be made by any person appointed for that purpose by the Court, whether he is or is not a solicitor of the Court; and the appointment of any such person, not being a solicitor, shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court (*f*).

(*f*) See note (*e*), p. 233, *ante*.

Extension of power to rescind general

VII. The powers contained in the said Act to make and rescind general rules and orders shall extend to the

matters to which this Act relates; and such rules and orders may, so far as may be found expedient, alter the procedure prescribed by the said Act and this Act (*g*). 21 & 22 Vict. c. 77, s. 7. rules and orders.

(*g*) See Cons. Ord. XLI. 14—25 (p. 222—234, *ante*).

VIII. In addition to the persons expressly enumerated in the thirty-third section of the said Act against whom demises authorised by the thirty-second section are to be valid, such demises, in the case of unsettled estates, shall be valid against the wife of any husband making such demise of estates to which he is entitled in right of such wife (*h*) As to validity of demises under section 33 of recited Act.

(*h*) See note (*z*), p. 231, *ante*.

CONFIRMATION OF SALES ACT.

25 & 26 VICT. CAP. 108.

[See page 268, *post*.]

LEASES AND SALES OF SETTLED ESTATES FURTHER AMENDMENT ACT, 1864.

27 & 28 VICT. CAP. 45.

An Act to further amend the Settled Estates Act of 1856.

[14*th July*, 1864.

WHEREAS by the tenth section of the Act passed in the Parliament holden in the nineteenth and twentieth years of Her Majesty's reign, intituled "An Act to facilitate Leases and Sales of Settled Estates," it was enacted, that when the Court of Chancery should deem it expedient that any general powers of leasing any settled estates, conformably to the said Act, should be vested in trustees, it might, by order, vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and that in every such case the Court, if it should 27 & 28 Vict. c. 45. 19 & 20 Vict. c. 120.

27 & 28 Vict. c. 45.

think fit, might impose any conditions as to consents or otherwise on the exercise of such power: And whereas, in order to protect the interests of persons interested in the settled estates affected by such powers, the practice of the said Court has been to require that leases granted in pursuance of a power vested in any trustees or other persons, under the provisions of the said tenth section of the said Act, should be settled by the said Court or by a judge thereof, or otherwise should be made conformable with a model lease deposited in the chambers of the judge: And whereas the introduction of such a condition has been found to occasion delay and expense, and so to create great difficulties in carrying into execution the objects of the Act, and such conditions may in general be safely omitted, and it is therefore expedient that the said Act should be amended as hereinafter mentioned: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Conditions that leases shall be settled by the Court not to be inserted in orders under sect. 10 of recited Act.

I. In orders to be hereafter made under the said tenth section for vesting any powers of leasing in any trustees or other persons, no condition shall be inserted requiring that the leases thereby authorised should be submitted to or be settled by the said Court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers (*a*), save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

(*a*) See note (*o*), p. 219, *ante*.

Conditions already inserted may be struck out by Court.

II. In all cases of orders already made in pursuance of the said tenth section, in which any such condition as aforesaid has been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order, by striking out such condition, and the Court shall have full power to alter the same accordingly, and

the order so altered shall have the same validity as if it had originally been made in its altered state (*b*); but nothing herein contained shall make it obligatory on the Court to act under this clause in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient. 27 & 28 Vict. c. 45. s. 2.

(*b*) See note (*n*), p. 219, *ante*.

III. And whereas doubts are entertained whether in the construction of the first section of the said Act the Court is bound by the state of facts existing at the period of the settlement taking effect, or by the state of facts at the time of an application to the Court under the said Act, and it is desirable that such doubts should be removed: Be it enacted, that the said Court, in determining what are settled estates within the said Act, shall be governed by the state of facts and by the trusts or limitations of the settlement at the time of the said settlement taking effect (*c*). Removal of doubts as to construction of sect. 1 of recited Act.

(*c*) See note (*c*), p. 215, *ante*.

IV. This Act shall be construed and dealt with as part of the said former Act as amended by the Act of the twenty-first and twenty-second years of Her Majesty's reign, chapter seventy-seven, and all proceedings under this Act shall be subject to the same rules and orders, and shall be conducted in the same manner, as proceedings under the said former Acts. Act to be construed with recited Act.

V. This Act shall extend to *Ireland* but not to *Scotland*. Extent of Act.

SETTLED ESTATES, 1856, AMENDMENT ACT, 1874.

37 & 38 VICT. CAP. 33.

An Act to extend the Powers of the Leases and Sales of Settled Estates Act. [16*th July*, 1874.

37 & 38 Vict. c. 33.

19 & 20 Vict. c. 120.

WHEREAS it is expedient to extend the operation of the Act, chapter one hundred and twenty of the nineteenth and twentieth years of Her Majesty to facilitate leases and sales of settled estates, hereinafter called the principal Act:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows, that

Short title.

1. This Act may be cited as the Leases and Sales of Settled Estates Amendment Act, 1874.

Notice to be given to persons who do not consent to or concur in application.

2. Where under the principal Act the concurrence or consent of any person in or to any application hereafter to be made under that Act is required, and such concurrence or consent shall not have been obtained, notice shall be given to such person, in such manner as the Court to which such application shall be made shall direct, requiring him to notify, within a time to be specified in such notice, whether he assents to or dissents from such application or submits his rights or interests, so far as they may be affected by such application, to be dealt with by the Court; and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court (*a*).

(*a*) See *Re Crabtree*, L. R. 10 Ch. 201, where notice was directed to be given to a person of unsound mind not so found, *Re Stark*, W. N. (1875) 224.

3. An order under the principal Act may be made upon any such application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained, or shall have been refused, but the Court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom, or who submit or are to be deemed to submit their rights or interests to be dealt with by the Court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made and every order of the Court made upon such application shall have the same effect as if all such persons had been consenting parties thereto (*b*). 37 & 38 Vict. c. 33, s. 3.

Court may dispense with consent, having regard to the number and the interests of parties.

(*b*) See *Taylor* v. *Taylor*, L. R. 1 Ch. Div. 426. An infant born after the presentation of the petition need not be served, *Re Lewis*, 24 W. R. 103.

4. All such applications shall be otherwise dealt with in such manner as are prescribed by the principal Act, or any orders made in pursuance thereof, with regard to the exercise of the powers conferred by that Act.

Applications to be dealt with otherwise as prescribed by principal Act.

SETTLED ESTATES ACT, 1856, AMENDMENT

39 & 40 VICT. CAP. 30.

An Act to amend the Settled Estates Act of 1856.

[24*th July*, 1876.

WHEREAS by section fourteen of the Settled Estates Act of 1856 (nineteenth and twentieth Victoria, chapter One hundred and twenty), herein called the Principal Act, it is enacted that it shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Principal Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, 39 & 40 Vict. c. 30.

39 & 40 Vict. c. 30.

or water courses, either to be dedicated to the public or not: And whereas difficulty in the exercise of the said power has arisen for want of sufficient power to direct the said streets and other works to be made and executed, and to provide for the expenses incurred in relation thereto, and it is expedient to amend the Principal Act accordingly:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

Making and executing, and expenses of laying out and making and executing, streets roads, and other works.

I. Where under section fourteen of the Principal Act any part of any settled estates is directed to be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not, the Court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connections, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid (*a*) by means of a sale or mortgage of, or charge upon, all or any part of the settled estates, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates.

(*a*) This section was enacted in consequence of the decision in *Re Venour*, note (*t*), p. 221, *ante*, under section 14 of the principal Act.

Short title and construction.

II. This Act may be cited as the Settled Estates Act, 1876, and shall be construed as one with the Principal Act.

CHANCERY AMENDMENT ACT, 1858.

(*Commonly called Lord Cairns' Act.*)

21 & 22 VICT. CAP. 27.

[By ss. 1 and 2, it was made lawful for the Court of Chancery to award damages. See now s. 24 of the Judicature Act, 1873]. 21 & 22 Vict. c. 27.

III. It shall be lawful for the Court of Chancery,* if it shall think fit, to cause the amount of such damages in any case to be assessed or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself (*a*), and the Court of Chancery may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury, for such assessment of damages or the trial of such question of fact, as may be made by any of the Superior Courts of Common Law at Westminster, and may also make any other orders which to the Court of Chancery * may seem requisite; and every such jury shall consist of persons possessing the qualifications, and shall be struck, summoned, ballotted for, and called in like manner, as if such jury were a jury for the trial of any cause in any of the said Superior Courts; and every juryman so summoned shall be entitled to the same rights, and subject to the same duties and liabilities as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts; and every party to any such proceeding shall be entitled to the same rights, as to challenge and otherwise, as if he were a party to any such cause; and generally for all purposes of or auxiliary to the assessment of damages, or the trial of questions of fact by a jury before the Court itself, and in respect of new trials, the Court of Chancery * shall have the same jurisdiction, powers, and authority in all respects as belong to any Superior Court of Common Law, or to any judge thereof, for the like purposes: Provided that from any order made by the Court on an application made for a new trial, there shall be the same right of appeal as from any other order of the Court.

Question of fact arising in any suit may be tried by a jury before the Court itself.

* Now the Chancery Division—Judicature Act, 1873, s. 34 (2).

21 & 22 Vict. c. 27, s. 3.

Power to send issue to the assizes.

Cases of nuisance.

Appeal from order directing issue to be tried in chancery.

Jury when summoned.

Parties might consent to dispense with one.

(*a*) But by s. 2 of Sir J. Rolt's Act (p. 247, *post*), where, from the nature of the case, it is desirable that the question of fact should be tried in a particular county or locality, it may be sent to the assizes (see Ord. XXXVI. r. 29, pt. II. *post*, which is to the same effect). It was held that this power to send an issue out of chancery was only given in those cases where justice would so be better done, *Fernie* v. *Young*, L. R. 1 H. L. 63. Recently however the Chancery judges have, after consulting together, declined to hear cases with a jury at all.

The Court of Chancery would not ordinarily try a question of nuisance before itself, unless the acts complained of were done in London or Middlesex, *Eaden* v. *Firth*, 1 H. & M. 572.

There might be an appeal on the question whether the trial should be before the Court of Chancery, or in a court of common law, *Fernie* v. *Young*, *ubi sup.*, though on the question whether the judge would try the question with or without the assistance of a jury, there was no appeal, *Schneider* v. *Shrubsole*, 12 W. R. 359.

The Court would generally summon a jury under the old practice, especially in patent cases, *Eaden* v. *Firth*, 1 H. & M. 573; *Davenport* v. *Goldberg*, 2 H. & M. 285, unless both parties consented to the judges deciding without one, or the case was not of difficulty, see *Taylor* v. *Brown*, 10 W. R. 361; *Grey* v. *Haig*, 20 Beav. 219; *Roberts* v. *Kerslake*, 1 K. & J. 751; *Egmont* v. *Darell*, 1 H. & M. 563; and especially as to the right of an heir at law to a jury, see *Williams* v. *Williams*, 33 Beav. 306; *Cowgill* v. *Rhodes*, *ibid.* 310.

The Court would not direct a jury to be summoned until it had heard enough of the case to be satisfied of its necessity, *George* v. *Whitmore*, 26 Beav. 558; *Bonser* v. *Bradshaw*, 4 Jur. N. S. 1011; *Bradley* v. *Bevington*, 4 Drew. 511, nor would an application for a jury be granted before the hearing except with the consent of both parties, *Jenkins* v. *Bushby*, 16 W. R. 189.

And if the validity of the claim of one of the parties appeared sufficiently established, he would not be put to the expense of a jury, *Davenport* v. *Goldberg*, 2 H. & M. 282, 285; *George* v. *Whitmore*, 26 Beav. 558; *Davenport* v. *Phillips*, 5 N. R. 485.

Questions ordered to be tried by jury to be reduced into writing.

IV. Any question of fact, and any question as to the amount of damages which shall be so ordered to be tried by a jury before the Court itself, shall be reduced into writing in such form as the Court shall direct (*b*), and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court of Chancery shall have the same powers, jurisdiction, and authority as belong to any judge of any of the said Superior Courts sitting at Nisi Prius.

Cons. Ord. XLI. rr. 26—52.

(*b*) Cons. Ord. XLI. rr. 26—52, provide as to trials before the Court with a jury as follows:—

Rule 26. Question to be reduced into written form, copied, filed and entered for trial.

26. *Any question of fact, or any question as to the amount of damages, which shall in any suit or proceeding be directed by any order to be tried by a jury before the Court itself, or before the Court itself without a jury, shall be reduced into writing, and the same shall be copied*

on parchment by the plaintiff or such person as the Court shall direct, or by the solicitor for such plaintiff or person, and shall be called the "record for trial;" and the same shall be filed with the Clerk of Records and Writs in whose division such suit or proceedings may be, within three days after such order shall have been passed and entered; and within three days after such filing as aforesaid, the same shall be entered for trial as hereinafter mentioned.

21 & 22 Vict. c. 27, s. 4.

Cons. Ord. XLI. rr. 26—52.

27. *Where the Court shall order such question or questions to be tried by a special jury, a direction to that effect shall be contained in the order directing such trial.*

Rule 27. Special jury.

28. *Upon production to the registrar of a certificate of the Clerk of Records and Writs that the "record for trial" has been filed, the same shall be set down for trial in the cause-book of the judge to whose court the suit or proceeding is attached, and shall be marked "trial by jury," or "trial before the Court without a jury," as the case may be; and either party may apply to the Court to fix a day for such trial.*

Rule 28. Setting down and marking of record for trial.

Day for trial.

Rules 30—35 of the Order provide for orders to the sheriff or coroner to summon a common or special jury for such trial.

36. *Either party shall be at liberty to apply by summons to a judge at chambers for a view by the jury summoned for any trial; and on the hearing of such summons each party shall name a shower for such view.*

Rule 36. Summons for a view. Form of order.

Rules 37, 38 provide that the summons and order for a view shall state the place and the distance from the office of the under-sheriff; and a scale of charges to be paid to the under-sheriff is given, and the practice after an order for a view is obtained is to be as in the superior courts of common law, when a special jury is ordered to be struck or a view is to be had, or as near thereto as the practice of this court will admit.

View to be same as at common law.

Rule 39 gave a form of notice to admit documents (see now Ord. XXXII. 2, Pt. II., *post*), and r. 40 provided for payment into court in satisfaction of damages; see now Ord. XXX. (Pt. II., *post*.)

Rule 39. Form of notice to admit documents.

41. *On the day appointed for any trial and previously to the commencement thereof, the record for trial, with the return and jury panel (if any) annexed thereto, shall be transmitted by the Clerk of Records and Writs to the registrar of the court in attendance; and a copy thereof*

21 & 22 Vict. c. 27, s. 4.

shall be left for the judge before whom such trial is appointed to be had, by the person at whose instance the same may have been entered for trial.

Cons. Ord. XLI., r. 26—52.

Rule 42. Calling and swearing of jurors. Swearing, &c., of witnesses.

Rule 42 gives the form of the oath of jurors and witnesses.

Rule 43. Addresses of counsel.

43. *Upon every such trial the addresses to the jury or to the Court, as the case may be, shall be regulated as follows: The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present in force in the superior courts of common law on trials at Nisi Prius.*

Rule 44 gives the form of the oath by the usher when he takes charge of the jury.

Rule 45. Indorsement and signature of verdict. Return of record, &c.

45. *The verdict or finding of the jury, or of the Court, as the case may be, shall be indorsed by the registrar of the Court on the record for trial, and shall be signed by him, and then returned to the office of the Clerks of Records and Writs to be filed, and if the trial shall have been by a jury, then with the jury panel and the names of the jurors who were sworn indorsed thereon.*

Rule 46 provides for motion for new trial, see now Ord. XXXIX., *post.*

Rules 47—52 give the form of and practice on writs of inquiry of damages, when the damages are directed to be assessed by a court of common law or at the assizes.

[By section V. it was made lawful for the Court of Chancery to try questions of damages or fact before itself without a jury (see now section 24 of the Judic. Act, 1873).]

[By section VI. issues might be sent to common law (see now Ord. XXXVI., r. 27, pt. II., *post*, above referred to).]

[By section VII. parties may be called on to admit documents (see Ord. XXXI., r. 12, pt. II., *post*).]

[By sections VIII.—X. the previous sections of the Act are to extend to the Court of Chancery in Ireland, and the Chancery Palatine of Lancaster; and by sections XI. XII. rules of procedure may be made (see Cons. Ord. XLI. 26—52, *supra*).]

CHANCERY REGULATION ACT, 1862.

(Commonly called "Sir John Rolt's Act.")

25 & 26 VICT. CAP. 42.

An Act to regulate the Procedure in the High Court of Chancery and the Court of Chancery of the County Palatine of Manchester. [17*th July*, 1862.

25 & 26 Vict. c. 42.

WHEREAS the High Court of Chancery has power in certain cases to refuse or postpone the application of remedies within its jurisdiction, until questions of law and fact on which the title to such remedies depends have been determined or ascertained in one of Her Majesty's courts of common law; And whereas it is expedient that the said power should no longer exist, and that in all such cases every question of law and of fact, cognizable in a court of common law, arising in the said Court of Chancery, on which the right of any party to any equitable relief or remedy depends, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, should be determined by or before the said Court itself: Be it enacted, &c.:

Court *shall* determine every question of law and fact incident to the relief sought.

I. In all cases in which any relief or remedy within the jurisdiction of the said Courts of Chancery respectively is or shall be sought in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact, cognizable in a court of common law, on the determination of which the title to such relief or remedy depends shall be determined by or before the same Court.

[Section 2 provided that "whenever it shall appear that any question of "fact may be more conveniently tried by a jury at the assizes, or at any "sitting in London or Middlesex for the trial of issues . . . it shall be lawful to "direct an issue to try any question of fact at the assizes to be held in and "for any county where the same may be conveniently tried or at any such "sitting for the trial of issues in London or Middlesex" (see note (*a*) p. 244, as to this power).]

25 & 26 Vict. c. 42, s. 3. [Section 3 applies the provisions of Lord Cairn's Act, 1858 (p. 243, *supra*), to this Act.]

Lord Cairns' Act.

When legal questions was not to be tried. [Section 4 provided that the Court need not decide a legal question where the matter had been improperly brought into equity, but see now Judicature Act, 1873, s. 24, *post*.]

Assistance of common law judge. [By section 5 the Court of Chancery might call for the assistance of a common law judge, see now Judicature Act, 1873, *post*.]

[Section 6 gave the short title and date of commencement of the Act.]

PROPERTY AND TRUSTEES RELIEF AMENDMENT ACT.

22 & 23 Vict. Cap. 35.

An Act to further Amend the Law of Property, and to relieve Trustees. [13*th Aug.* 1859.

22 & 23 Vict. c. 35.

Leases. [Sections 1 and 2 relate to *provisoes for re-entry on breach of covenants in a lease*, and enact that a lessor giving license for, or waiving *one breach* of covenant (23 & 24 Vict. c. 38, s. 6, *post*), or in the case of *one of several lessees*, is not to lose the benefit of the covenants.]

[By section 3 the apportionment of rent among lessors is not to destroy the right of re-entry.]

Policies of insurance. [Sections 4—6 provide that "a Court of Equity shall have power (but not "more than once) to relieve against a forfeiture for breach of a covenant to "insure against fire, where no loss or damage by fire has happened, and "the breach has been committed without fraud or gross negligence, and "there is an insurance on foot at the time of the application to the "Court."]

[Section 7 provides, as some compensation, that the lessee shall have the benefit of an informal insurance.]

[Section 8 protects purchasers of leaseholds against the consequence of omissions to insure on the part of those from whom they purchase.]

[And by section 9 "the preceding provisions shall be applicable to leases "for a term of years absolute, or determinable on a life or lives or other-"wise, and also to a lease for the life of the lessee or the life or lives of any "other person or persons."]

Apportionment of rentcharge. [The 10th section relates to apportionment of rentcharge, which is not to extinguish the rentcharge.]

[Section 11 provides that the release of part of land charged is not to affect a judgment; but see now 27 & 28 Vict. c. 112, *post*.]

Defective appointments. [Section 12 relates to appointments under powers; and as, by common law, if the *formalities* required by the instrument creating the power were not *strictly* complied with, the appointment was void, while Courts of Equity went to the other extreme, and aided defective execution of powers, in favour of purchasers, &c., even where the defect was in matter

of substance, *e.g.*, the want of a *consent* required by an instrument, this section provides that "a *deed* hereafter executed in the presence of and "attested by two or more witnesses in the manner in which deeds are "ordinarily executed and attested shall, *so far as respects the execution and* "*attestation* thereof, be a *valid execution of a power of appointment by deed,* "*or by any instrument in writing not testamentary:* Provided always, that "this provision shall *not operate to defeat any direction* in the instrument "creating the power that the *consent* of any particular person shall be "necessary to a valid execution, or that any *act shall be performed* in order "to give validity to any appointment."] 22 & 23 Vict. c. 35, s. 12.

[By section 13 a *bonâ fide* sale under a power is not to be avoided by reason of mistaken payment to tenant for life. This section was to meet the case of *Cockerell* v. *Cholmeley*, 1 R. & M. 418, where an estate was devised to a trustee and his heirs, to the use of A. for life, without impeachment over, and the trustee under a power of sale, with A.'s consent, sold the estate *apart from the timber*, which was taken at a valuation, and the power was held to be both at law and in equity badly executed.] Sale under power.

[Sections 14 to 18 provide that (subject to the savings contained in section 18; see Lewin, 340) "where by any will which shall come into operation "after the passing of this Act the testator shall have *charged his real estate* "*with the payment of his debts*, or with the payment of any legacy or other "specific sum of money, and shall have *devised the estate so charged to any* "*trustee or trustees*, the devisee in trust may raise money by sale, notwith-"standing want of express power in the will; but if he shall not have de-"vised the hereditaments charged as aforesaid in such terms as that his "whole estate and interest therein shall become vested in any trustee or "trustees, the *executor or executors* are to have the power of raising "money."] Sale by trustees and executors.

[Sections 19 and 20 supply a deficiency in the law of inheritance, 3 & 4 Will. 4, c. 106, and will be found in Sugden's R. P. Statutes, 259.]

[Section 21 relates to the assignment of personalty, and provides that "any person shall have power to assign personal property, now by law "assignable, including chattels real, *directly to himself and another person* "or other persons or corporation, by the like means as he might assign the "same to another."] Assignment to self and others.

[Section 22 enacts that after December 31, 1859, the provisions as to registration of judgments, shall apply to Crown debts.] Registration of judgments.

XXIII. "The *bonâ fide* payment to and the receipt of "any person to whom any purchase or mortgage money "shall be payable upon any express or implied trust shall "effectually discharge the person paying the same from "seeing to the application or being answerable for the "misapplication thereof, *unless the contrary shall be ex-* "*pressly declared by the instrument* creating the trust or "security" (*a*). Trustees' receipts.

(*a*) This section seems only to apply to instruments executed since 13th August, 1859; see Lewin, 240. Lord Cranworth's Act, ss. 29, 34, *post*,

22 & 23 Vict. c. 35, s. 23.

pp. 304, 306, contains a more general power for trustees to give sufficient discharges, but only applies to instruments executed since August 28, 1860.

Concealment of incumbrances a misdemeanor.

[Section 24 provides that any vendor or mortgagor concealing any settlement deed, will, or other instrument material to the title, or any incumbrance, from the purchaser [*or mortgagee*], shall be guilty of a misdemeanor, and punishable accordingly.

The insertion of the words [or mortgagee], which were accidentally omitted, was provided for by 23 & 24 Vict. c. 38. s. 8, *post*, p. 259.]

Interpretation of terms.

[Section 25 interprets "land," "mortgagee," and "judgment," as used in the previous provisions in this Act.]

Trustees and executors.

[By section 26 trustees, executors, or administrators making payment under a power of attorney are not to be liable by reason of death of party giving such power.]

As to liability of executor or administrator in respect of rents, covenants, or agreements.

XXVII. Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed or ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof (*b*), he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased

into the hands of the person or persons to or amongst whom the said assets may have been distributed. 22 & 23 Vict. c. 35, s. 27.

(*b*) This section is retrospective, *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Re Green*, 2 D. F. J. 121; and see *Reilly* v. *Reilly*, 34 Beav. 406; *Bennett* v. *Lytton*, 2 J. & H. 155, 158. Section retrospective.

The case of a leasehold assigned to a residuary legatee is not within this section, such legatee not being a purchaser (*Dodson* v. *Sammell*, 2 Dr. & Sm. 575). Executor must assign the leasehold.

See as to the effect of the section, *Dodson* v. *Sammell* (*ubi sup.*); *Re Hawkins*, 10 Hare, App. xxxiii.; *Re Forest*, W. N. (1868) 194; and see *England* v. *Lord Tredegar*, L. R. 1 Eq. 344.

As to liability of executor, &c., in respect of rents, &c., in conveyances on rent-charge

XXVIII. In like manner, where an executor or administrator liable as such to the rents, covenants, or agreements, contained in any conveyance or chief rent or rentcharge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained

22 & 23 Vict. c. 35, s. 28.

shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

XXIX. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims (*c*), be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.

Indemnity of executors issuing notices to creditors.

(*c*) As to the advertisements, see Cons. Ord. XXXV. 35—37, *ante*, p. 149; Order 27 May, *ante*, 1865, p. 156; and *Wood* v. *Weightman*, L. R. 13 Eq., 434. Executors acting under the provisions of this section, whether they have actually paid legacies over, or only appropriated them, have complete protection against future claims, *Clegg* v. *Rowland*, 3 L. R. Eq. 368.

This section does not protect executors against claims of which they have in fact notice, *Re Land Credit Company of Ireland*, W. N. (1872) 210.

Trustee, executor, &c., may apply by petition to judge of Chancery for opinion, advice, &c., in management, &c., of trust property.

XXX. Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery, or by summons (*d*) upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question (*e*) respecting the management or administration of the trust property or the assets of any

testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said judge shall think expedient (*f*); and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject matter of the said application: Provided nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction and the costs (*g*) of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made. 22 & 23 Vict. c. 35, s. 30.

(*d*) The application under this section should be by *petition*, not summons, *Re Dennis*, 5 Jur. N. S. 1388. For a form of petition, see *Re Miles*, 27 Beav. 579; *Re Pett's Will*, 27 Beav. 576. Application how made.

By an Order of Court, dated 20th March, 1860, it was provided as follows:—

1. *All petitions, summonses, statements, affidavits, and other written proceedings under the 30th section of the said Act shall be intituled, "In the matter of the said Act, and in the matter of the particular trust, will, or administration;" and every such petition and statement shall be marked in manner directed by the 6th of the Consolidated General Orders, Rule 6*; and every such petition or statement shall state the facts concisely, and shall be divided into paragraphs, numbered consecutively; and every such summons shall, except as to its title, be in the form of the general summons in schedule (K), No. 1 † subjoined to the Consolidated General Orders.* 1. Title and form of petition, &c.

* See now Ord. V. r. 4, pt. II., *post*.

† *I.e.*, the ordinary summons in chambers.

2. *At the time when any summons is sealed, the statement upon which the same is grounded shall be left at the chambers of the judge, and shall, on the con-* 2. Statement on which summons is granted to be

22 & 23 Vict. c. 35, s. 30.

transmitted to registrar.

clusion of the proceeding, be transmitted to the registrar by the chief clerk, with the minutes of the opinion, advice, or direction given by the judge; and the registrar shall cause such statement to be transmitted to the report office, to be there filed.

3. Service of summons or petition.

3. *Every such petition or summons shall be served seven clear days before the hearing thereof, unless the person served shall consent to a shorter time.*

4. Opinion, &c., of judge, how passed and entered.

4. *The opinion, advice, or direction of the judge shall be passed and entered, and remain as of record, in the same manner as any order made by the Court or judge, and the same shall be termed "a Judicial Opinion," or "Judicial Advice," or "Judicial Direction," as the case may be.*

5. Fees.

5. *The fees of Court, and the fees and allowances to solicitors, on proceedings under the 30th section of the said Act, shall be the same as are now payable under the Consolidated General Orders XXXVIII. and XXIX.,* and by the practice of the Court for business of a similar nature.*

* See now Additional Rules (Costs).

Petition to be signed by counsel.

Lord St. Leonard's Act, 1860, s. 9, p. 259, *post*, provides that "the petition "or statement shall be signed by counsel" (but see Ord. XIX. r. 4, pt. II., *post*), and the "judge by whom it is to be answered, may require the "petitioner or applicant to attend him by counsel, either in chambers or in "Court, where he deems it necessary to have the assistance of counsel." The Court made an order under the section on the petition of a *cestui que trust*, *Re Ward*, 14 W. R. 96; and of one trustee without his co-trustee's concurrence, *Re Muggeridge*, Johns. 625.

Service.

As to service under this section, see note (*f*) *infra*. It was originally held that the direction of the judge as to the persons to be served should be obtained in the first instance, *Re Muggeridge*, *loc. cit.*; see *Re Simson*, 1 J. & H. 89. But this practice has since been disapproved of, *Re Green*, 8 W. R. 403, cited on note to s. 19 of Settled Estates Act (225, *ante*). It is not, it seems, necessary to serve all persons interested (*Re Muggeridge*, *loc. cit.*), unless there is a deficiency of assets (*Re Mockett*, Johns. 628), *Re Tuck*, W. N. (1869) 15.

What questions entertained on petition.

(*e*) "As the Act does not give any right of appeal, it was not intended to decide nice questions of law, its object being to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust," Lewin, 443; *Re Muggeridge*, Johns. 15; *Re Mockett* (*loc. cit.*); *Re Spiller*, 2 L. T. N. S. 71, 8 W. R. 333; *Re Leslie*, W. N. (1876) 93; *Re Jacob*, 9 W. R. 474. So the Court will give advice as to investments, *Re Lorenz*, 1 Dr. & Sm. 401; *Re Knowles*, 18 L. T. N. S. 809; or payment of debts, *Re Box*, 1 H. & M. 552; or propriety of trustees consenting to a sale, *Earl Powlett* v. *Hood*, L. R. 5 Eq. 115, or advancing money for maintenance, or repairs, *Re Lord Hotham*, L. R. 12 Eq. 76; *Cuthbertson* v. *Wood*, 19 W. R. 265; or leasing, *Re Shaw*, *ibid.*, 125.

Questions of management.

Not (1) questions of detail

But where trustees were authorised by the settlement to lay out trust funds in purchasing real estate, which was accordingly purchased, and a

petition was presented to obtain a direction of the Court as to the employment of a further portion of the trust funds in the permanent improvement of the purchased estates, the Court having no means of ascertaining the amount required or directing its application, refused to make an order on petition (*Re Barrington*, 1 J. & H. 142; comp. *Re Mockett*, Johns. 628). In another case (*Re Simson*, 1 J. & H. 89); where the question was whether a trustee would be justified in investing in East India stock or in railway debentures, or on mortgage of freeholds, copyholds, or leaseholds, V.-C. Wood answered the inquiry by simply stating that the trustees would be justified in investing in freehold securities in England or Wales, and gave no answer to the rest of the question; see *Marsh* v. *Attorney-General*, 2 J. & H. 61; where the Court thought the question too difficult to decide on petition, and directed a bill to be filed. 22 & 23 Vict. c. 35, s. 30. where affidavits are required; nor (2) questions of difficulty;

So where questions of construction arise, an action must be instituted, or the advice of the Court taken under the Trustee Relief Act; see *Re Evans*, 30 Beav. 232, *Re Muggeridge*, Johns. 625; *Re Lorenz*, 1 Dr. & Sm. 401; where V.-C. Kindersley refused, on a petition under this Act, to advise a sole trustee of a marriage settlement as to his discretionary power to make advances to the husband at the written request of the wife, and *Re Hooper*, 29 Beav. 657; where the Master of the Rolls stated that the object of the Act was to enable trustees to obtain the opinion of the Court on matters of discretion vested in them, and *not to determine questions of construction*. These cases seem to overrule cases where questions as to the validity (*Re Michel*, 28 Beav. 39) or construction (*Re Green*, 8 W. R. 403; *Re Davies*, 9 W. R. 134; *Re Elmore*, 6 Jur. N. S. 1325; *Re Jacob*, 29 Beav. 402), of a bequest have been determined upon petition under the section, and *Re Pett's Will*, 27 Beav. 576, where an opinion was given turning to a certain extent upon extrinsic evidence admitted with a view to the construction of a will. See, however, *Re Peyton's Settlement*, 10 W. R. 515, where the Master of the Rolls in a petition under this Act decided that an absolute power of sale given to trustees, authorised them on a sale to fix a reserved bidding. nor (3) questions of construction;

The Court will not pronounce an opinion on an hypothetical case; and, therefore, refused to give any advice as to the incidence of future calls which might be made on account of shares bequeathed, *Re Box*, 1 H. & M. 552, 11 W. R. 945. nor (4) hypothetical cases.

The opinion of the Court is subject to no appeal, and does not prevent an action (*Re Mockett's Will*, Johns. 628). No appeal.

(*f*) In *Re Larken*, W. N. (1872) 85, it was held unnecessary to serve any person, &c., see *Re Tuck*, W. N. (1869) 15. See cases last page as to service. Service.

(*g*) As a general rule the costs of an application under this section will be ordered to come out of the *corpus* of the trust property, *Re M'Veagh*, Seton, 773; *Re Elwes*, *ibid.*, 774. Costs.

But where the question arose as to the application of income, the costs came out of the income, *Anon.*, 8 W. R. 333.

[By sect. 31, trust instruments are to be deemed to contain clauses for the indemnity, *i.e.*, of trustees.]

[Sect. 32 relates to investments by trustees, and this section is made retrospective by Lord St. Leonard's Act, 1860, sect. 12, pp. 261, 2, *post*, where this and the other sections relating to investments will be found.]

[Sect. 33 provides that the Act shall not extend to Ireland.]

THE PETITION OF RIGHT ACT, 1860.

23 & 24 Vict. Cap. 34.

23 & 24 Vict. c. 34.

[As to the operation of this Act and the history of the remedy by petition of right, see remarks of Wickens, V.-C., in *Kirk* v. *The Queen*, L. R. 14 Eq. 558.]

The following is the General Order in Chancery under the Act :—

Ord., 1 Feb. 1862. Petitions of Right.

ORDER, 1st February, 1862.

PETITIONS OF RIGHT.

Rule 1. Petition of right to be filed at Record and Writ Office.

1. Upon Her Majesty's fiat being obtained to any petition of right presented in pursuance of the said Act and intituled in the Court of Chancery, such petition, with the fiat thereon, together with a printed copy of such petition and fiat (if the petition is in writing), shall be filed at the office of the Clerks of Records and Writs.

Rule 2. Marked with name of judge.

2. Every such petition, or the printed copy thereof, so filed shall be marked with the words "Lord Chancellor" or "Master of the Rolls," and if with the words "Lord Chancellor," then also with the title of the Vice-Chancellor before whom it is intended to be prosecuted.

Rule 3. Printed and stamped copies for service.

3. Every copy of a petition of right left at the office of the Solicitor of the Treasury in pursuance of the said Act, and every copy of a petition of right served upon or left at the last, or usual, or last known place of abode of any person under the provisions of that Act shall be a printed copy, sealed with the seal of the office of the Clerks of Records and Writs, in the same manner as copies of bills are now sealed. And the leaving or serving of any copy not printed or not sealed with the office seal shall be of no effect for any of the purposes of the said Act.

Rule 4. Interrogatories for examination of respondents.

4. A suppliant in any petition under the said Act desiring to file interrogatories for the examination of any person or persons who may be required to plead or answer thereto (other than Her Majesty's Attorney-General) shall file such interrogatories at the same time as such petition. And a copy, examined and marked by the

Clerks of Records and Writs, of the interrogatories which any respondent is required to answer shall be served upon such respondent, together with the copy of the petition. 23 & 24 Vict. c. 34. Ord., 1 Feb. 1862.

5. Any person who might be admitted to prosecute a suit in this Court *in formâ pauperis* (*a*) may be admitted to prosecute *in formâ pauperis* a petition of right intituled in this Court. And any person who might, if a defendant to an ordinary suit in this Court, have been admitted to defend *in formâ pauperis* may be admitted to make his defence *in formâ pauperis* to any petition of right instituted in this Court which he may be required to plead or answer to. But no person shall be admitted to prosecute any petition *in formâ pauperis* without a certificate of counsel that he conceives the case to be proper for relief in this Court. Rule 5. Right to petition *in formâ pauperis*.

(*a*) See the note to Order as to Fees (part II.), *post*.

6. The same orders and rules shall apply with regard to any person admitted to sue or defend *in formâ pauperis* under these orders as are applicable with regard to paupers in suits between subject and subject. Rule 6. Rules as to petitioning *in formâ pauperis*.

7. So far as the same may be applicable, and except in so far as may be inconsistent with the said Act and with the preceding orders, the general orders from time to time in force as to proceedings in suits in this Court, and the practice and course of proceeding in this Court in reference to such suits, shall be applicable, and apply and extend to proceedings in this Court in petitions under the said Act, which are, for the purposes of this order, to be considered as bills (*b*). Rule 7. Practice in reference to suits shall apply to proceedings by petition of right.

(*b*) The petition being left at the office of the solicitor to the Treasury (r. 3), may be pleaded or demurred to, or answered, for which purpose further time may be allowed. In default it may be taken *pro confesso*, 23 & 24 Vict. c. 34, s. 8; a decree may be made and costs given as in an ordinary suit, *ibid.* ss. 9—14. See *Tobin* v. *The Queen*, 11 W. R. 915. Rule 8. Defence to petition of right.

Notwithstanding the Act and these rules, any supplicant may proceed according to the practice before the Act (s. 18); under which the Court did not at the hearing of the petition enter into the merits, but directed a commission to inquire whether a suit should be instituted. See Mitf. Plead. 33; Daniell, 131—3.

8. The duties which under the said Act and the said Rule 8. Duties and

23 & 24 Vict. c. 34.

fees of officers of the court.

orders may be required to be performed by officers of this Court, shall be performed by the officers respectively, who perform duties of a similar nature in suits in this Court between subject and subject. And the fees and allowances payable to all officers and solicitors of this Court, in respect of matters under the said Act, shall be such fees and allowances as, by the practice of the Court and the general orders from time to time in force, they are entitled to take and charge for similar proceedings in cases between subject and subject.

LAW OF PROPERTY FURTHER AMENDMENT ACT.

23 & 24 VICT. CAP. 38.

An Act to further amend the Law of Property.
[*23rd July*, 1860.

23 & 24 Vict. c. 38.

Judgments.

Writs of execution of judgments should be registered (see now 27 & 28 Vict. c. 112, *post*).

Before July, 1861, old law applies.

Effect of notice.

[Section 1 provided that no judgment entered up after the passing of this Act (23 July, 1860) shall affect any land as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment), unless *a writ or other due process of execution is issued and registered* before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money by him: And no judgment entered up after the passing of the Act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be *executed and put in force within three calendar months* from the time when it was registered. (See now the Act of 1864, p. 269, *post*, judgments registered before the date of this Act (23 July, 1860) affect purchasers, &c., according to the old law, though no writ of execution has been issued, see *Evans* v. *Williams*, 2 Dr. & Sm. 324; and as regards the debtor himself, and volunteers under him, the old law was in force until 27 & 28 Vict. c. 112, which is general in its provisions.)]

Mode of registering.

Double search necessary.

[By section 2 the registry of any writ of execution, or other due process on any judgment, in order to bind a purchaser or mortgagee, was to be made by a memorandum or minute referring to the judgment already registered, so as to connect the registry of the writ of execution or other process therewith; and the senior master of the Court of Common Pleas at Westminster was to enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment was registered. (The registry of the writ of execution is now to be made in the name of the debtor by 27 & 28 Vict. c. 112, s. 3, *post*, p. 270.]

Protection of executors against

[Section 3, reciting 4 & 5 W. & M. c. 20 (since repealed), and other Acts as to the registration of judgments, provided that no judgment which had not already been, or which should not thereafter be entered or docketed so

as to bind lands, tenements, or hereditaments as against purchasers, mortgagees, or creditors, should have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates. See *Fuller* v. *Redman*, 26 Beav. 600 ; Williams on Executors, 937 ; *Re Williams*, L. R. 15 Eq. 220. If executors have notice of judgments, such judgments obtain priority, whether registered or not (*Jennings* v. *Rigby*, 33 Beav. 198). 23 & 24 Vict. c. 38, s. 3. unregistered judgments.

The section applies to judgments signed before the Act, *Kemp* v. *Waddington*, L. R. 1 Q. B. 355, and to County Court judgments, *Re Turner*, 33 L. J. Ch. 232.]

[Section 4 provided that judgments, in order to have preference in administration, must be re-registered every five years according to the Acts of 1 & 2 Vict., 2 & 3 Vict., and 18 & 19 Vict.]

[Section 5 defined judgments as they are now defined by the latest judgment Act, 27 & 28 Vict. c. 112, s. 2, p. 270, *post.*]

[Section 6 amended the law of waiver as between lessor and lessee, see p. 248, *ante.*]

[Section 7 relates to the laws of uses, and the doctrine of scintilla juris, as to which, see Sandars on Uses, pp. 112, 152.] Doctrine of uses.

[Section 8 corrected a clerical error in sect. 24 of 22 & 23 Vict. c. 35, p. 250, *ante.*]

[Section 9 provides that trustees applying for the opinion, advice, or direction of a judge of the Court of Chancery, under section 30 of 22 & 23 Vict. c. 35, the petition or statement should be signed by counsel, see p. 254, *ante.*]

X. It shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors of the said Court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of the Lords Justices of Appeal and the Master of the Rolls in Ireland, to make such general orders from time to time as to the investment of cash under the control of the Court (*a*), either in the Three per Cent. Consolidated or Reduced or New Bank Annuities, or in such other stocks, funds, or securities as he or they shall, with such advice or assistance, see fit; and it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners in England, and for the Lord Chancellor in Ireland, to make such orders as he or they shall deem proper for the conversion (*b*) of any Three per Cent. Bank Annuities now standing or which may hereafter stand in the name of the Power to Lord Chancellors, &c., of England and Ireland to make general orders as to investment of cash under the control of the Court.

23 & 24 Vict. c. 38, s. 10.

Accountant-General of the said Court of Chancery, in trust in any cause or matter, into any such other stocks, funds, or securities upon which, by any such general order as aforesaid, cash under the control of the Court may be invested; all orders for such conversion of Bank Annuities into other funds or securities to be made upon petition to be presented by any of the parties interested in a summary way, and such parties shall be served with notice thereof as the Court shall direct (*c*).

1 Feb. 1861. Investments.

(*a*) By a general order, dated 1st Feb. 1861, it was provided as to investments of sums in Court, as follows :—

Rule 1. Investment of cash under the control of the Court.

1. *Cash under the control of the Court may be invested in Bank Stock, East India Stock, Exchequer Bills, and* 2*l.* 10*s. per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated* 3*l. per Cent. Annuities, Reduced* 3*l. per Cent. Annuities, and New* 3*l. per Cent. Annuities.*

Rule 2. Service of petition.

2. *Every petition for the purpose of the conversion of any* 3*l. per Cent. Bank Annuities into any other of the stocks, funds, or securities hereinbefore mentioned, shall be served upon the trustees, if any, of such Bank* 3*l. per Cent. Annuities, and upon such other persons, if any, as the Court shall think fit.*

The last India Loan under Acts of 1859 or subsequent Acts, is within the Trustees Investment Act (22 & 23 Vict. c. 35, p. 262, *infra*), but no order has been passed to include it in these orders.

A petition for *investment* of cash under the control of the Court (under rule 1) does not require to be served on the trustees, *Re Adams*, 17 L. T. N. S. 641.

Cash *under control of Court.*

In Re Briscoe, 4 N. R. 311, L. J. Turner doubted whether money paid in under the Lands Clauses Act in respect of a lunatic's estate could be ordered to be invested under this section, but the same monies being transferred to an account in lunacy, were directed to be so invested. See sect. 70 of the Lands Clauses Act and note (*i*), *ante*, p. 39. As to the application of the section to the 25th section of the Settled Estates Act which specifies only Exchequer Bills or 3*l.* per cent. stock as investments, see note (*s*), p. 229, *ante*; compare *Re Birmingham Bluecoat School*, 1 L. R. Eq. 632; *Re Wilkinson*, 9 L. R. Eq. 343, where the section was applied to enlarge the investments allowed by a private Act; and compare *Ex parte G. N. Ry. Company*, *ibid.* 274.

Change of investment in special cases,

(*b*) The Court will not grant a petition for conversion from bank annuities into the securities mentioned in the order, if tenant for life or remaindermen would suffer unduly by the change, *Cockburn* v. *Peel*, 3 D. F. J. 170

(decided by the full Court of Appeal); see *Haywood* v. *Pile*, 5 L. R. Ch. 214. And it seems that when there are no special circumstances in the case, such as exigencies in the family which make it desirable for the children entitled in remainder that their parents' income should be increased, the application will be refused, see *Re Langford*, 2 J. & H. 458; *Re Boyce* (before the M. R. in Ireland), 15 W. R. 827. Where there are such special circumstances the Court exercises a liberal discretion, *Peillow* v. *Brookings*, 4 L. T. N. S. 731, where the tenant for life had a wife and five children and an income not exceeding £70; and see *Equitable Reversionary Interest Society* v. *Fuller*, 1 J. & H. 379; *Bishop* v. *Bishop*, 9 W. R. 549; and compare *Cohen* v. *Waley*, *ibid.*, 137; decided before the issuing of the order. In *Mortemer* v. *Picton*, 12 W. R. 292, it was held that where the primary object of the trusts on which funds are held (in that case the payment of £500, in lieu of jointure, to the plaintiff) would otherwise be defeated, the Court will authorise a change of investments.

to increase the income of tenant for life,

or carry out the primary object of the trusts.

Where a married woman had a life interest in the fund, and was also entitled absolutely in the event of her having no children, there being little probability of her having children, V.-C. Kindersley allowed an investment in East India Stock, *Vidler* v. *Parrott*, 12 W. R. 976; *Montefiore* v. *Guedalla*, W. N. (1868) 87. And where an applicant was very poor, the usual provision against receiving three dividends in the year by reason of the change was omitted, *Re Ingram*, 11 W. R. 980.

Compare as to the discretion of the Court under the section, *Hume* v. *Richardson*, 10 W. R. 528, 4 D. F. J. 29, where the Lords Justices held that a trustee acting according to his *bonâ fide* discretion, was justified, *as the Court would be*, both in retaining money already invested in English and Irish Bank Stock and East India Stock, and in making a fresh investment in those securities (see sect. 11, *infra*).

Discretion Court.

In *Ungless* v. *Tuff*, 9 W. R. 729, the Court made no special declaration in the decree, but sanctioned generally investment in real securities, and gave liberty to apply in chambers. Enquiry in chambers was dispensed with in *Lucas* v. *Rudd*, 16 W. R. 325.

Liberty to apply in chambers.

The costs of an application to vary an investment are generally payable out of income, *Equitable Reversionary Interest Society* v. *Fuller*, 1 J. & H. 379; *secus*, where a petition would in any case have been necessary, *Re Langford*, 2 J. & H. 458.

Costs of application.

(*c*) See *Re Adams*, cited last page.

XI. When any such general order as aforesaid shall have been made it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, or any of them, to invest (*d*) such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the Court may from time to time be invested.

Powers of trustees to invest in the stocks in which cash under the control of the Court may be invested

(*d*) See also the following enactments as to investments by trustees: 22 & 23 Vict. c. 35, made retrospective by sect. XII. of the Act in the text, *infra* (but not so as to interfere with rights already accrued, *Re Richardson*, 10 W. R. 528, 4 D. F. J. 29), provides that when a trustee, executor, or administrator "shall not, by some instruments "creating his trust, be expressly forbidden to invest any trust fund on "real securities (see *Re Warde*, 2 J. & H. 191), in any part of the "United Kingdom, or on the stock of the Bank of England or Ireland, "or on East India Stock, it shall be lawful for such trustee, executor,

Investments by trustees (22 & 23 Vict. c. 35) in real security. The Bank of East India stock.

23 & 24 Vict. c. 38, s. 11.

"or administrator to invest such trust fund on such securities or "stock; and he shall not be liable on that account as for a breach of trust, "provided that such investment shall in other respects be reasonable and "proper."

Investments by trustees.

"East India Stock."

30 & 31 Vict. c. 132, s. 1, provides that "the words 'East India Stock' "in the said Act (22 & 23 Vict. c. 35) shall include and express as well "the East India Stock which existed previously to the 13th August, 1859, "when the said Act received the assent of her Majesty, as East India "Stock charged on the revenues of India, and created under and by virtue "of any Act or Acts of Parliament which received her Majesty's assent on "or after the 13th August, 1859; and it shall be lawful for every trustee, "executor, or administrator to invest any trust fund in his possession or "under his control in the stock created by the last-mentioned Act or Acts "to the same extent, and for the same purposes and objects, as he can "now invest such trust fund in the East India Stock, which existed "previously to the 13th August, 1859." (Railway Stock with a charge on the revenues of India, is not within this Act, *Green* v. *Angell*, W. N. (1867) 385.)

30 & 31 Vict. c. 132. Right to property of intestate barred after twenty years.

30 & 31 Vict. c. 132, s. 2, provides that "it shall be lawful for every "trustee, executor, or administrator to invest any trust fund in his pos- "session, or under his control, in any securities the interest of which is or "shall be guaranteed by parliament to the same extent and in the same "manner as he may invest such trust fund in such securities as aforesaid."

See also 34 & 35 Vict. c. 27, as to investments by trustees debentures, and *ibid.*, c. 47, as to investments Metropolitan Stock.

[Section XII. made 22 & 23 Vict. c. 35, s. 32, retrospective. See note (*d*), *supra*.]

[Section XIII. recites 3 & 4 Will. 4, c. 27, s. 40, which provides that money charged on land and legacies are to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meanwhile, and extends that enactment to the case of claims to the estates of persons dying intestate. As to what cases come within this section, see Shelford's R. P. Statutes, 248—262.]

[Section XIV. provides that the order to take account of debts, &c., of deceased person, under sect. 19 of 13 & 14 Vict. c. 35, may be made immediately after probate granted. See p. 118, *ante*.]

Act not to extend to Scotland, &c.

XV. This Act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

TRUSTEES AND MORTGAGEES ACT.

23 & 24 VICT. CAP. 145.

An Act to give to Trustees, Mortgagees, and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills (*a*). [28*th August*, 1860.

23 & 24 Vict. c. 145.

WHEREAS it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments, should be made

incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument: Be it enacted, &c., as follows (*a*): 23 & 24 Vict c. 145.

(*a*) It must be remembered that this Act only applies (see sect. 34) to persons entitled or acting under instruments executed after 28 Aug. 1860. Its operation (see sect. 32) may be negatived by express or implied (see *Re Thompson*, Johns. 418, 424; *Re Jackson*, 16 W. R. 572) declaration; and it only provides for the case of the simplest and most ordinary instruments, so that it seems rather intended to supply defects in ill-drawn wills and settlements, than to supersede the labours of the skilled conveyancer; and as it is generally desirable that each particular instrument should enable trustees to ascertain their powers and duties in relation to sales, &c., the general provisions of the Act are seldom made use of. Extent of application of the Act.

PART I.

Powers of Trustees for Sale, &c., and Trustees of Renewable Leaseholds.

[Sect. 1 provides that trustees empowered to sell may sell in lots, and either by auction or private contract (see Lewin, 321, 323). Trustees for sale.

Sect. 2 provides that such sale may be made under special conditions, and trustees may buy in, &c. (see Lewin, 321, 323).

Sect. 3 provides that trustees exercising power of sale shall have power to convey (see Lewin, 323).

By sects. 4 and 5, the monies arising from sales are to be laid out in other lands, or in paying off incumbrances.

By sect. 6 money arising from sales is not to be laid out, nor lands exchanged, elsewhere than in the country in which lands sold or exchanged are situated.

By sect. 7, until purchase of lands, &c., the money is to be invested at interest.

By sect. 8, trustees of renewable leaseholds may renew, and as to their duty to purchase if the lessees cease to renew (see remarks of James, V.-C., in *Re Wood*, L. R. 10 Eq. 572, at p. 584). Renewal of leases.

By sect. 9, money for equality of exchange and for renewal of leases may be raised by mortgage, &c.

By sect. 10, no sale, &c., to be made without consent of tenant for life, &c. (see *Offen* v. *Harman*, 1 D. F. J. 253).]

PART II.

[Sects. 11—16 make the powers of sale, &c., usually inserted in mortgage, incident to the estate of a mortgagee. Mortgagee's power of sale

As to sales by mortgagees under the 15 & 16 Vict. c. 86, s. 48, see *ante*, p. 196.

Sect. 11 provides that "where any principal money is secured or charged "by deed on any *hereditaments of any tenure or on any interest therein*" (so that the section does not apply where the mortgage is of chattels personal, *e.g.*, of policies, or of hereditaments not the subject of tenure, as a personal annuity descending to the heir, see *Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Ex parte Wynch*, 5 D. M. G. 218), "the person to whom such money "shall for the time being be payable, his executors, administrators, and assigns, of hereditaments of tenure.

23 & 24 Vict. c. 145, s. 11.

"shall, at any time after the expiration of one year from the time when "such principal money shall have become payable, according to the terms "of the deed, or after any interest on such principal money shall have been "in arrear for six months, or after any omission to pay any premium on "any insurance which, by the terms of the deed, ought to be paid by the "person entitled to the property subject to the charge, have—

"1st. A power to sell:

"2nd. A power to insure:

"3rd. A power to appoint or obtain the appointment of a receiver."

Sect. 12 provides that the mortgagee's receipts for purchase-money shall be sufficient discharges.

By sect. 13 notice is to be given before sale; but the purchaser is relieved from inquiry as to circumstances of sale.

Sect. 14 provides for the application of purchase-money.

Sect. 15 provides that "the person exercising the power of sale shall "have power by deed to convey to the purchaser."

Sect. 16 provides that "at any time after the power of sale hereby con- "ferred shall have become exercisable, the person entitled to exercise the "same may call for title deeds and conveyance of legal estate."

Sect. 17 provides for the appointment of a receiver, by the mortgagee; and,

Sect. 18 provides that "every receiver appointed as aforesaid shall be "deemed to be agent of the mortgagor."

Sect. 19 provides for the powers of such receiver; sect. 20 for his removal; sect. 21 for his payment by receiving a commission not exceeding five per cent.

By sect. 22 the duties of a mortgagee's receiver are pointed out.

By sect. 24 "the powers and provisions contained in this part of this "Act relate only to mortgages or charges made to secure money advanced "or to be advanced by way of loan, or to secure an existing or future "debt."]

Part III.

Provisions as to Investments of Trust Funds, Appointment and Powers of Trustees and Executors, &c.

[Sect. 25 related to investments by trustees; but much more extensive powers in regard to investment are given by the previous Acts (as to which see note (*d*), p. 261), and this section is therefore practically inoperative.]

Trustees may apply income of property of infants, &c., for their maintenance.

XXVI. In all cases where any property is held by trustees in trust for an infant (*b*), either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (*c*) (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any *part* of the income to which such infant may be *entitled* (*d*) in respect of such property whether there be any other fund

applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not (*e*); and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year. 23 & 24 Vict. c. 145, s. 26.

(*b*) The section does not apply in the case of an adult, *Re Breel*, L. R. 1 Ch. Div. 226.

(*c*) This word will include a father, *Re Cotton*, L. R. 1 Ch. Div. 232.

(*d*) The word entitled does not mean indefensibly entitled, but the section applies to infants who will only be entitled contingently on their attaining, 21, *Re Cotton, ubi sup.*

(*e*) See Lewin, 419. Applications as to the maintenance and advancement of infants may be made in chambers, and as to the advice of the Court, see p. 252, note (*d*), *ante*.

XXVII. (*f*) Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid, Provisions for appointment of new trustees on death, &c.

23 & 24 Vict. c. 145, s. 27.

all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee shall with all convenient speed be conveyed, assigned, and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely, or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust.

Power to appoint new trustees.

(*f*) See sect. 32 of the Trustee Act, and note (*s*) thereto, pp. 100, 101, *ante*. Where a trust instrument contained no power of appointing new trustees, but there was a surviving trustee, a petition by one of the *cestuis que trusts* to appoint a new trustee was refused, the power being held to be in the surviving trustee under this section, *Re Soulsby*, L. J. W. N. (1873) 6. This section does not provide for the case of a trustee residing abroad (comp. *Re Watt's Settlement*, 9 Hare, 106, and *Withington* v. *Withington*, 16 Sim. 104, with *Mennard* v. *Welford*, 1 Sm. & Gif. 426), nor for the case of all the trustees retiring simultaneously (*Stones* v. *Rowton*, 17 Beav. 308), nor for there being two sets of trustees of the same instrument (the surviving or continuing trustees of one set being not necessarily the best persons to appoint new trustees of the other set), nor for an augmentation or reduction of the number of trustees (see Lewin on Trusts; *Re Bathurst*, 2 Sm. & Gif. 169; *Meinertzhagen* v. *Davis*, 1 Coll. 335).

Appointment of new trustees in cases herein named.

XXVIII. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

Trustees' receipts to be discharges.

XXIX. The receipts in writing of any trustees or trustee (*g*) for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof (*h*).

(*g*) *I.e.*, if appointed by an instrument dated subsequently to 28th August, 1860. (Sect. 34, *post.*) 23 & 24 Vict. c. 145, s. 29.

(*h*) See 22 & 23 Vict. c. 35, s. 23, and note p. 249, *ante.*

[By sect. 30 any executor may compound, and compromise debts and claims.]

Part IV.

General Provisions.

Tenants for life, &c., may execute powers, notwithstanding incumbrances.

XXXI. For the purposes of this Act, a person shall be deemed to be *entitled to the possession or to the receipt of the rents* (*i*) and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

(*i*) Compare note (*b*), p. 47, *ante.*

Powers, &c., hereby given may be negatived by express declaration.

XXXII. None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances shall take effect or be exercisable if it is declared in the deed, will, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will, or other instrument, such powers or incidents shall be exercisable or shall take effect only subject to such variations or limitations.

No persons other than those entitled under the settlement, &c., to be affected.

XXXIII. Nothing in this Act contained shall be deemed to empower any trustees or other persons to deal with or effect the estates or rights of any person soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will, or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights.

Commencement of Act.

XXXIV. The provisions contained in this Act shall,

23 & 24 Vict. c. 145, s. 34.

except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this Act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Extent of Act.

XXXV. This Act shall not extend to Scotland.

CHANCERY REGULATION ACT.

25 & 26 VICT. CAP. 42.

[See this Act commonly called Sir John Rolt's Act, p. 247, *ante*.]

CONFIRMATION OF SALES ACT, 1862.

25 & 26 VICT. CAP. 108.

An Act to confirm certain Sales, Exchanges, Partitions and Enfranchisements by Trustees and others.

[*7th August*, 1862.

25 & 26 Vict. c. 108, s. 2.

[Section 1 of this Act confirmed sales previously made apart from minerals, and not then impeached by any suit.]

Trustees may dispose of land or minerals separately without the residue, &c.

II. And whereas it is expedient that trusts and powers to dispose of land by way of sale, exchange, partition, or enfranchisement should be extended in the manner hereinafter appearing: Every trustee and other person (*a*), now or hereafter to become authorised to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals (*b*), or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition, the minerals with or without such rights or powers, separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals or (as the case may

be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery to be obtained on petition in a summary way of the trustee (*c*) or other person authorised as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition without the necessity of any further or other application to the Court (*d*). 25 & 26 Vict. c. 108, s. 2. Sanction of Court of Chancery requisite.

(*a*) Including mortgagees, *Re Beaumont*, L. R. 12 Eq. 86, even though a foreclosure bill is pending, *Re Wilkinson*, L. R. 13 Eq. 634.

(*b*) The Court had previously *under the Settled Estates Act* allowed sales of minerals apart from the surface; note (*q*), p. 220, *ante*. Sales apart from minerals.

(*c*) The persons interested should be served or made parties, *Re Palmer*, L. R. 13 Eq. 408, or sufficiently represented; but a petition by the trustees of a settlement who had power to sell with consent of the tenant for life, being served on him need not be served on the remainderman, *Re Pryse*, L. R. 10 Eq. 531. *Cestuis que trusts* should be served.

(*d*) The Court has made an order on petition authorizing sales of land apart from minerals, generally and without reference to any particular sale, *Re Willway*, 32 L. J. Ch. 226; *Re Wynn*, L. R. 16 Eq. 237. Court will authorize sales generally.

III. This Act shall not extend to Ireland or Scotland. Extent of Act.

JUDGMENT ACT, 1864.

27 & 28 VICT. CAP 112.

An Act to amend the Law relating to future Judgments, Statutes, and Recognizances. [29*th July*, 1864.

WHEREAS it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances (*a*). Therefore, be it enacted, &c., as follows:— 27 & 28 Vict. c. 112.

(*a*) This must mean common law recognizances, and not those which are entered into by persons who give security to the Court of Chancery (now the Chancery Division), for the latter are never registered but enrolled, see Fisher on Mortgages 91, note (*k*).

I. No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually Future judgments, &c., not to affect land until

27 & 28 Vict. c. 112, s. 1.

delivered in execution (*b*) by virtue of a writ of elegit or other lawful authority (*c*) in pursuance of such judgment, statute, or recognizance.

Land delivered in execution.

Priority of judgments, *inter se.*

(*b*) These words mean that in the case of lands as in the case of chattels no lien is obtained by a delivery of the writ, unless followed by a return to the writ and actual execution, but the question of priority of judgments *inter se*, depends on the date at which the active step of delivery of the writ to the sheriff was taken; *Champneys* v. *Burland*, 19 W. R. 148; *Re Cowbridge Railway*, L. R. 5 Eq. 413; *Guest* v. *Cowbridge Railway*, L. R. 6 Eq. 619; *Re Bailey*, W. N. (1869) 43; *Re Duke of Newcastle*, L. R. 8 Eq. 700; *Earl of Cork* v. *Russell*, W. N. (1871) 219.

Interest which cannot be taken in execution.

Equitable interests.

(*c*) The Act does not apply to an interest which cannot be taken in execution, *e.g.*, a remainder, *Re South*, L. R 9 Ch. 369. If there is any obstacle, *e.g.*, if the debtor's interest is an equity of redemption, the creditor's remedy (which he cannot have till he has delivered the writ to the sheriff) is to institute an action to remove the obstacle, *Re Cowbridge Railway*, L. R. 5 Eq. 413; *Thornton* v. *Finch*, 4 Giff. 505; *Guest* v. *Cowbridge Railway*, L. R. 6 Eq. 619, 17 W. R. 7; *Beckett* v. *Buckley*, W. N. (1874); *Hatton* v. *Haywood*, L. R. 9 Ch. 229; *Wells* v. *Kilpin*, L. R. 18 Eq. 298. Where persons holding the debtor's land under a voluntary conveyance yielded their claims and gave up possession to sequestrators, this was held delivery in execution by lawful authority, *Re Rush*, L. R. 10 Eq. 442.

Right of judgment creditors to redeem.

As to the judgment creditor's right to redeem prior incumbrances, see *Mildred* v. *Austin*, L. R. 8 Eq. 220.

Interpretation of terms.

II. In the construction of this Act the term "judgment" shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment; and the term "land" shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term "debtor" shall be taken to include husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons.

[By section 3 every writ or other process of execution of any such judgment, statute, or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the name of the debtor. See 23 & 24 Vict. c. 38, s. 2, p. 258, *ante*. The registration may be made before the return to the writ, *Champneys* v. *Burland*, 19 W. R. 148.]

Creditor to whom land delivered in execution entitled to obtain summary order.

IV. Every creditor to whom (*d*) any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in

force, to obtain from the Court of Chancery,* upon petition in a summary way, an order for the sale (*e*) of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable (*f*).

27 & 28 Vict. c. 112, s. 4.

* See now Judicature Act, 1873, *post*, s. 34 (2).

(*d*) A creditor who had obtained an order in an administration suit against a defendant for payment of *money into Court*, which order had been enforced by the sequestration of the Court, was held not to be within the section, the land having been delivered in execution not to him but to the Court, *Johnson* v. *Burgess*, L. R. 15 Eq. 398.

(*e*) The section applies only to judgments entered up after the passing of the Act, 29 July, 1864, see sect. 1, and *Re Isle of Wight Ferry Company*, 34 L. J. Ch. 194.

Sale at instance of judgment creditor.

A railway company's lands may be ordered to be sold under the section; but the Court will not order a sale if the debtor's interest is not of a saleable nature, but will direct inquiries, *Re Bishop's Waltham Railway Company*, 2 L. R. Ch. 382; *Gardner* v. *London, Chatham, and Dover Railway Company*, *ibid.* 385; and see now 30 & 31 Vict. c. 127 (p. 272, *post*), protecting the rolling stock and plant of railways from execution, and authorising railway companies, who are unable to meet their engagements, to file schemes of arrangement, and after filing such scheme to apply for stay of actions, suits, and executions.

Railway Companies Act, 1867.

(*f*) For form of inquiries in the case of lands belonging to a railway company, see *ibid.*, and *Re Hull and Hornsea Railway Company*, 2 L. R. Eq. 262; and *Re Ventnor Harbour Company*, 13 L. T. N. S. 793; and for form of inquiries in ordinary cases, see *Ex parte Clark*, 6 N. R. 335, and compare Seton, 455. Where surplus lands had been taken under an elegit sale was ordered without inquiries (*Re Calne Valley Company*, L. R. 9 Eq. 658).

Form of inquiry.

V. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the

Where there are other creditors, notice of sale to be served upon them.

27 & 28 Vict. c. 112, s. 5.

persons who may be found entitled thereto, according to their respective priorities (*g*).

(*g*) See *Guest* v. *Cowbridge Railway*, L. R. 5 Eq. 413; *Re Duke of Newcastle*, L. R. 8 Eq. 706.

Parties claiming interest through debtor bound by order for sale.

VI. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

Extent of Act.

VII. This Act shall not extend to Ireland.

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30 & 31 Vict. c. 48.

SALE OF LAND BY AUCTION ACT.

30 & 31 VICT. CAP. 48.

[See ss. 7—9, quoted p. 131, *ante*.]

COURT OF CHANCERY (OFFICERS) ACT.

30 & 31 VICT. CAP. 87.

30 & 31 Vict. c. 87.

[Sects. 1—8 of this Act gave power to appoint additional chief clerks and junior clerks, and additional registrars.]

[Sects. 11 and 12 (as to cheques in the Accountant-General's office) are repealed by the Chancery Funds Act, 1872 (35 & 36 Vict. c. 44) *post*.]

[By s. 13, the jurisdiction in lunacy was allowed to be exercised by either of the Lords Justices sitting separately (see now Judicature Act, 1875, s. 7, *post*).]

RAILWAY COMPANIES ACT (1867).

30 & 31 VICT. CAP. 127.

An Act to amend the Law relating to Railway Companies.
[20*th August*, 1867.

30 & 31 Vict. c. 127.

BE it enacted, &c., as follows:—

Preliminary.

I. This Act may be cited as The Railway Companies Act, 1867. 30 & 31 Vict. c. 127, s. 1.

Short title.

II. Except as in this Act expressly otherwise provided this Act shall not extend to Scotland.

Extent of Act.

III. In this Act—

Interpretation of terms.

The term "company" means a railway company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose):

The term "action" includes suit or other proceeding:

The term "judgment" includes decree, order, or rule:

The term "share" includes stock:

The term "person" includes corporation:

The term "Court of Chancery" or "Court" means the Court of Chancery* in England or Ireland, as the case requires:

The term "Gazette" means, with respect to England, the "London Gazette," and with respect to Ireland the "Dublin Gazette."

* See now Judicature Act, 1873, s. 34 (2).

Protection of Rolling Stock and Plant.

IV. The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic (*a*), be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the first day of September, one thousand eight hundred and sixty-eight,* where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the

Interim restrictions until 1 September, 1870, on executions against property of railway open for traffic.

* Extended to 1 April, 1870, by 31 & 32 Vict. c. 79.

30 & 31 Vict. c. 127, s. 4.

passing of this Act (*b*), but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery* in England or in Ireland, according to the situation of the railway of the company; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein (*c*); and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager.

* See now Judicature Act, 1873, s. 34 (2).

Open for public traffic.

(*a*) A railway, part of which had been occupied by another company, but not opened by the company which made it, was held not to be open for public traffic, within the Act, *Re Beddgelert Ry.* 19 W. R. 427.

Contract after the Act.

(*b*) Where a judgment was recovered for money due for services rendered both before and after the passing of the Act, the Act was held not to apply, *Re Beddgelert Ry., ubi sup.*

Form of order.

(*c*) For form of order, see *Re Stafford and Uttoxeter Ry.*, W. N. (1868) 113; *Contract Corporation* v. *Tottenham Ry., ibid.*, 242.

Determination of questions respecting executions.

V. If in any case where property of a company has been taken in execution a question arises whether or not it is liable to be so taken notwithstanding this Act, the same may be heard and determined on an application by either party by summons in a summary way to the Court out of which the execution issued, or if the Court is one of the Superior Courts of Law, then to a judge of any one of those Courts, and such determination shall be final and binding (*d*).

Sections 4, 5, temporary.

(*d*) These two sections, 4 and 5, restrained judgment creditors from levying execution, and allowed them to petition for a receiver, until 1870; the rules 29—32 of the Order of 24 Jan., 1868, which regulated the practice under those sections are spent, and are not reprinted.

Arrangements.

Preparation and filing of scheme of arrangement.

VI. Where a company are unable to meet their engagements with their creditors, the directors may prepare a

scheme of arrangement (*e*) between the company and their creditors (with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share and loan capital, or either of them), and may file the same in the Court of Chancery* in England or in Ireland, according to the situation of the principal office of the company, with a declaration in writing under the common seal of the company to the effect that the company are unable to meet their engagements with their creditors, and with an affidavit of the truth of such declaration made by the chairman of the board of directors and by the other directors, or the major part in number of them, to the best of their respective judgment and belief.

30 & 31 Vict. c. 127, s. 6.

* See Judicature Act, 1873, s. 34 (2).

(*e*) For a form of scheme, see *Re Teign Valley Ry. Compy.*, 18 L. T. N. S. 809, and for leave given to vary a scheme when filed, see *Re Cambrian Ry.*, L. R. 3 Ch. 278 ; 17 L. T. N. S. 394.

Form of scheme.

The General Order of Jan. 24, 1868, provides in the third schedule the following form for advertisement of the scheme :—

Form of advertisement for persons to apply for copies.

In the matter of the Railway Company ; and
In the Matter of the Railway Companies Act, 1867.

Notice is hereby given, that on the day of 18 , a Scheme of Arrangement between the above-named company and their creditors [*state here whether the scheme contains or not any provisions for settling the rights of any and what classes of shareholders as among themselves, or for raising additional share or loan capital, and which, and to what extent*] was filed in the Court of Chancery, and a copy of the said scheme will be furnished to any person requiring the same by the undersigned, or at the office of the company, at on payment of the regulated charges for the same.

A. and B., of [Agents for C. and D., of],
Solicitors for the Company.

Ord. Jan. 24, 1868.

The same order provides with reference to the preparation and filing of the scheme as follows :—

Title of scheme and proceedings.

1. *Every scheme to be filed in the Court of Chancery, pursuant to the statute* 30 *&* 31 *Vict. c.* 127, *s.* 6, *and every declaration, affidavit, petition, summons, notice, or other proceeding relative thereto, shall be intituled in the matter of "The Railway Companies Act*, 1867," *and in the matter of the company in question.*

To be attached to Court.

2. *Every such scheme shall be marked either with the words "Lord Chancellor," and the name of one of the Vice-Chancellors, or with the words "Master of the Rolls,"*

30 & 31 Vict. c. 127, s. 6.

and the matter of such scheme (unless removed by some special order of the Lord Chancellor or the Lords Justices) shall accordingly be attached to the Court of such Vice-Chancellor, or to the Court of the Master of the Rolls, as the case may be, in like manner and for the same purposes as causes are attached to a particular Court.

To be printed.

3. *Every scheme to be filed as aforesaid shall be printed on paper of the same size and description, and in the same style and manner as bills in Chancery are required to be printed, or shall be written bookwise upon paper of the same size and description as last aforesaid.*

Form of affidavits, &c.

* See now Additional Rules, Aug. 1875, Ord. III

4. *Every declaration and affidavit to be filed as mentioned in the 6th section of the said Act shall be written* bookwise upon paper of the same size and description as that on which bills are printed.*

Fling of scheme.

5. *Every such scheme shall be filed in the office of the Clerks of Records and Writs, and the declaration and affidavit required by section 6 of the said Act shall be annexed to such scheme and filed at the same time therewith, and the Clerks of Records and Writs shall not file any such scheme unless accompanied by such declaration and affidavit.*

Address for service.

6. *There shall be indorsed upon every scheme so filed as aforesaid the name and address of the solicitor and London agent (if any) of the company, and also the address for service of such solicitor in cases where an address for service is required by the General Orders of the Court.*

Filing a written scheme.

7. *Where a written scheme is filed, the person bringing the same to be filed shall, at the same time, leave with the Clerks of Records and Writs a fair copy thereof, and the Clerks of Records and Writs are to examine such copy with the scheme filed, and return it so examined, with a certificate thereon that it is correct and proper to be printed.*

To be printed in four days

8. *The directors are then to cause the scheme to be printed from such certified copy, on paper of the same size and description, and in the same type, style, and manner, as bills are required to be printed, and, before the expiration*

of four days from the filing of the scheme are to leave a printed copy thereof with the Clerks of Records and Writs, with a written certificate thereon by the solicitor of the company that such print is a true copy of the scheme so certified, and after the expiration of such four days no evidence of the scheme having been filed shall be admissible until such printed copy thereof has been filed.

30 & 31 Vict. c. 127, s. 6.

9. *Every fifth line of each page of a printed scheme shall be numbered.*

Lines to be numbered.

Copies of Scheme.

10. *At any time after the expiration of four days from the filing of a scheme, whether printed or written, any person may demand, by a requisition in writing, delivered at the principal office of the company, or at the office of their solicitor, or of his London agent (if any) any number, not exceeding ten, of printed copies* of the scheme, and the copies so required shall on such demand be delivered to the person so requiring the same, with a written certificate thereon by the solicitor of the company that they are true copies of the scheme filed.*

Copies of scheme.

* See form of advertisement for such persons to come in, *supra.*

11. *Every such copy is on delivery to be paid for at the rate of one halfpenny per folio, except in the case provided for by the 20th section of the said Act,* in which case it is to be paid for at the rate prescribed by the said Act.*

Payment for copies.

* P. 285, *post.*

12. *The notice, to be published in the "Gazette," of the filing of the scheme,* shall be signed by the solicitor of the company, or his London agent, and shall state whether the scheme contains any provisions for settling and defining any rights of shareholders among themselves, or for raising any and what amount of share or loan capital, and which, and shall set forth the name and address of the solicitor and London agent (if any) of the company, and may be in the form No. 1 in the 3rd schedule hereto, with such variations as the circumstances of the case may require.*

Form of notice.

* See sect. 8, *infra.*

13. *When a scheme has been filed one of the Clerks of Records and Writs shall, at the request of any person, give and sign a certificate of the filing thereof, or of the filing*

Certificate of filing scheme.

30 & 31 Vict. c. 127, s. 6.

of a printed copy thereof; and such certificate may be in the following form, with such variations as the circumstances of the case may require:—

In the Matter of the Railway Companies Act, 1867, and In the Matter of The Railway Company.

I do hereby certify that a [printed *or* written, *as the case may be*] Scheme of Arrangement between the above-named company and their creditors, under the statute 30 and 31 Victoria, chapter 127, section 6, was, on the day of , 18 , duly filed in the High Court of Chancery in England, together with the declaration and affidavit required by the said statute [and that a printed copy of such scheme was on the day of , duly filed in the said Court pursuant to the General Order of Court made in that behalf], as appears by my book. Dated, &c.

A. B.,
Clerk of Records and Writs, of the High Court of Chancery in England.

Stay of actions.

VII. After the filing of the scheme, the Court may, on the application of the company on summons or motion in a summary way, restrain any action against the company on such terms as the Court thinks fit (*f*).

Restraint of actions, &c., during suspended period.

(*f*) Under a special Act it was provided that a company might issue debenture stock to certain creditors, and a suspense period was created within which no action was to be commenced without leave, except in respect of liabilities contracted after the passing of the Act, and it was held that the debenture stock so created was within the protection of the Act, and that the holders thereof could not without leave institute a suit for the purpose of obtaining payment of interest in arrear, *London Financial Association* v. *Wrexham Railway Company*, L. R. 18 Eq. 566; see *Re Cambrian Railway Company*, L. R. 3 Ch. 278; *Re Devon and Somerset Railway*, 6 L. R. Eq. 610, as to the jurisdiction to restrain suits by landowners under these sections while the scheme is maturing.

Whether landowners and outside creditors not capable of being bound by majorities can be restrained from suing.

As the scheme when confirmed will not bind (under section 18) such outside creditors or unpaid landowners without their individual consent (only mortgagees, holders of rent charges, shareholders, and leasing companies, being bound by majorities, as mentioned in ss. X—XIV), the Court ought not to restrain such outside creditors or unpaid landowners, *Re Bristol and North Somerset Railway Company*, L. R. 6 Eq. 448, unless it is satisfied that a scheme is proposed in good faith which, if it reaches maturity, will afford a reasonable prospect of providing for the payment of the claim of the person whose remedies are then interfered with, and thus compensate the claimant for the temporary suspension of his remedies, *Re Cambrian Railway Company's Scheme*, 3 L. R. Ch. 278. See *Robertson* v. *Wrexham, &c., Railway Company*, 17 W. R. 127.

No jurisdiction under sects. 7 and 9 after inrolment of scheme.

When the scheme is confirmed and inrolled, outside creditors not included or bound by it may pursue their remedies without any leave of the Court, *Re Teign Valley Railway Company*, 17 W. R. 817; *Re East and West Junction Railway Company*, 8 L. R. Eq. 87, 91, and this section and the 9th have no longer any application, as they only give the Court an interim jurisdiction during the period of suspense, *Re Potteries, Shrewsbury, and North Wales Railway Company*, 5 L. R. Ch. 67.

The scheme, though not confirmed within three months under section 17, *infra*, was held to be pending so far as regarded protection by interim orders against creditors, *Robertson* v. *Wrexham, &c., Railway Company*, 17 W. R. 137.

The Order of 24 Jan., 1868, provides as to restraining actions after scheme filed as follows :— 30 & 31 Vict. c. 127, s. 7.

14. *No order, under section 7 of the said Act, for restraining an action against the company, by reason of a scheme having been filed, shall be made, except on an undertaking by the company to be answerable in such damages (if any) as the Court, or the judge in chambers, may think fit to award in the event of the plaintiff being ultimately held entitled to proceed with such action; and on such further terms (if any) as the Court or judge may think reasonable.* Ord. 24 Jan. 1868. Undertaking as to damages.

VIII. Notice of the filing of the scheme shall be published in the "Gazette" (*g*). Notice in "Gazette."

(*g*) See sched. III. to the Order 24 Jan., 1868, cited in note (*e*), p. 275, *ante*.

IX. After such publication of notice no execution, attachment, or other process against the property of the company (*h*) shall be available without leave of the Court, to be obtained on summons or motion in a summary way (*i*). Stay of executions, &c.

(*h*) Unpaid calls are property of the company within this section, and an injunction will issue to restrain execution against shareholders in a *scire facias* action, *Re Devon and Somerset Railway Company*, L. R. 6 Eq. 610. As to the circumstances under which a creditor will be allowed to pursue his remedies notwithstanding this section, see *Griffiths* v. *Cambrian Railway*, 17 W. R. 979, decided under a special act containing similar provisions. Stay of *scire facias* against shareholders.

(*i*) An application to issue execution notwithstanding the pendency of the scheme should, if it is confirmed, be made before the judge who sanctioned it, *Dean of Christchurch* v. *East and West Junction Railway*, 17 W. R. 819. After the inrolment of the scheme this section has no longer any application, *Re Potteries, &c., Railway Company*, L. R. 5 Ch. 67. Application by creditor after sanction or inrolment of scheme.

X. The scheme shall be deemed to be assented to by the holders of mortgages or bonds issued under the authority of the company's special Acts when it is assented to in writing by three-fourths in value of the holders of such mortgages or bonds, and shall be deemed to be assented to by the holders of debenture stock of the company when it is assented to in writing by three-fourths in value of the holders of such stock. Assent by mortgagees, &c.

XI. Where any rentcharge or other payment is charged on receipts of or is payable by the company in consideration of the purchase of the undertaking of another com- Assent by holders of rentcharge, &c.

30 & 31 Vict. c. 127, s. 11.

pany, the scheme shall be deemed to be assented to by the holders of such rentcharge or other payment when it is assented to in writing by three-fourths in value of such holders.

Assent by preference shareholders.

XII. The scheme shall be deemed to be assented to by the guaranteed or preference shareholders of the company when it is assented to in writing as follows: If there is only one class of guaranteed or preference shareholders, then by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders than one, then by three-fourths in value of each such class.

Assent by ordinary shareholders.

XIII. The scheme shall be deemed to be assented to by the ordinary shareholders of the company when it is assented to at an extraordinary general meeting of the company specially called for that purpose.

Assent by leasing company.

XIV. Where the company are lessees of a railway the scheme shall be deemed to be assented to by the leasing company when it is assented to as follows:—

In writing by three-fourths in value of the holders of mortgages, bonds, and debenture stock of the leasing company;

If there is only one class of guaranteed or preference shareholders of the leasing company, then in writing by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders in the leasing company than one, then in writing by three-fourths in value of each such class;

By the ordinary shareholders of the leasing company at an extraordinary general meeting of that company specially called for that purpose.

Assent of creditors, &c., not affected, unnecessary.

XV. Provided that the assent to the scheme of any class of holders of mortgages, bonds, or debenture stock, or of any class of holders of a rentcharge or other payment as aforesaid, or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class or company.

XVI. If at any time within three months (*j*) after the filing of the scheme, or within such extended time as the Court from time to time thinks fit to allow, the directors of the company consider the scheme to be assented to as by this Act required, they may apply to the Court by petition in a summary way for confirmation of the scheme.

30 & 31 Vict. c. 127, s. 16.

Application for confirmation of scheme.

Notice of any such application, when intended, shall be published in the Gazette.

(*j*) A scheme was considered to be pending after the three months so as to afford protection against creditors, *Robertson* v. *Wrexham, &c., Railway*, 17 W. R. 137.

XVII. After hearing the directors, and any creditors shareholders, or other parties whom the Court thinks entitled to be heard on the application (*k*), the Court, if satisfied that the scheme has been within three months after the filing of it, or such extended time (if any) as the Court has allowed (*l*), assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme.

Confirmation of scheme.

(*k*) Debenture holders will not be heard, if there was a statutory majority, unless in case of fraud, *Re East and West Junction Railway*, L. R. 8 Eq. 87. The Court required the consent of outside creditors (who are not within the classes of creditors who can be bound by a majority) before it confirmed a scheme, in *Re Bristol and North Somerset Railway*, L. R. 6 Eq. 448 ; but in *Re Somerset and Dorset Railway*, 18 W. R. 333, Stuart, V.-C., said that if a creditor came to oppose the confirmation, who could not show that his dissent was reasonable or based upon a due regard for his own interests, he would not regard the dissent of a creditor of that kind, but would confirm the scheme. In *Re East and West Junction Railway* (*ubi sup.*) it was held that the assent of outside creditors was not wanted. In any case, they ought not to be put in a better position by the scheme, *Stevens* v. *Mid-Hants Railway Company*, L. R. 8 Ch. 1064.

Who will be heard.

Outside creditors.

(*l*) The Order of Jan. 24, 1868, provides with reference to the petition for confirmation of scheme, as follows :—

Ord. 24 Jan., 1868.

15. *Every petition for confirmation of a scheme shall be presented by the directors or the major part of them. Such petition shall not set forth the scheme, but only refer thereto ; and may be in the form of No. 2, in the 3rd schedule hereto, with such variations as the circumstances of the case may require.*

Petition to be by directors.

Company not to appear.

The following is the form referred to :—

No. 2. *Petition to confirm Scheme.*

24 Jan. 1868. Order under Railway Act, 1867.

In the Matter of the Railway Company ; and In the Matter of the Railway Companies Act, 1867.

30 & 31 Vict. c. 127, s. 17.

The humble petition of Directors of the above-named company

Showeth

That on the day of , the directors of the above-named company filed in this Honourable Court, a Scheme of Arrangement between the above-named company and their creditors.

Your petitioners therefore humbly pray that the scheme so filed as aforesaid may be confirmed by the Order of this Honourable Court.

And your petitioners will ever pray, &c.

Company not to appear.

16. *The petitioners presenting such petition as aforesaid shall, for the purposes of such petition, be treated as representing the company, and the company shall not otherwise appear on the hearing of such petition.*

Hearing of petition for confirmation after notice.

17. *When any petition to confirm a scheme is presented, the directors shall apply to the judge in chambers to appoint the day on which the same is to come into the paper for hearing, such day not to be before the expiration of three weeks from the time of such application, and shall cause a notice of the presentation thereof to be inserted as follows (that is to say):*

(1) *In the case of a company whose principal office is within ten miles from the General Post Office in the "London Gazette," and in such two London daily morning newspapers as the judge in chambers shall direct.*

(2) *In the case of any other company, in the London Gazette, and in such two local newspapers circulating in the district where the principal office of such company is situate, as the judge in chambers shall direct.*

Such notice shall state the day on which the scheme was filed, and the day on which the petition was presented, and the day on which the same is directed to come into the paper for hearing, and the name and address of the solicitor and London agent (if any) of the company, and may be in the form No. 3 in the 3rd schedule hereto, with such variations as the circumstances of the case may require.

The following is the form referred to :—

Advertisement of petition to confirm scheme.

In the Matter of the Railway Company, and In the Matter of the Railway Companies Act, 1867.

Notice is hereby given that a Petition was, on the day of 18 , presented to the Lord Chancellor

[*or* the Master of the Rolls] by the Directors of the above-named company, praying the confirmation of a Scheme of Arrangement between the said company and their creditors, filed in the Court of Chancery on the day of .
And that the said petition is directed to be heard before the Vice-Chancellor Sir [*or* before the Master of the Rolls] on the day of , 18 , and any person whose interests are affected by such scheme, and who may be desirous to oppose the making of an order for the confirmation thereof under the above Act, should enter an appearance at the Office of the Clerks of Records and Writs on or before the day of 18 , and appear by himself or counsel at the hearing of the said petition. And a copy of the Scheme and Petition will be furnished to any person requiring the same by the undersigned, or at the office of the company, at , on payment of the regulated charge for the same.

30 & 31 Vict. c. 127, s. 17.

A. and B., of [Agents for C. and D., of],
Solicitors for the Petitioners.

CHELMSFORD, C.
ROMILLY, M. R.
CAIRNS, L. J.
JOHN STUART, V. C.
W. P. WOOD, V. C.
RICHARD MALINS, V. C.

Further notice directed in chambers.

18. *The petition shall not come on to be heard until at least fourteen clear days after the insertion of such notice as aforesaid. Such notice shall, at least once in every entire week, reckoned from Sunday morning to Saturday evening, which shall have elapsed between the time of the first insertion thereof, and the day on which such petition is directed to come into the paper for hearing, be again inserted in such two London or local newspapers as aforesaid on such day or days as the judge in chambers shall direct.*

Parties to be heard in opposition.

19. *Any creditor, shareholder, or other party whose rights or interests are affected by such scheme, and who shall be desirous to be heard in opposition to the confirmation thereof, shall, at least two clear days before the day on which the petition for confirmation is directed to come into the paper for hearing, enter an appearance at the office of the Clerks of Records and Writs; and, in default of so doing, shall not be entitled to be heard, unless by the special leave of the Court.*

Jurisdiction as to costs.

20. *Any person so entering an appearance shall be deemed to have submitted himself to the jurisdiction of the Court as to the payment of costs and otherwise.*

30 & 31 Vict. c. 127, s. 17.

21. *No scheme shall be deemed to have been confirmed by the Court of Chancery until an order for confirming the same has been inrolled.*

Order for confirmation of schemes.

Notice of order.

22. *Notice of any order for confirming a scheme shall, at least once in every entire week, reckoned from Sunday morning to Saturday evening, which shall elapse between the pronouncing of such order and the expiration of thirty days from the pronouncing thereof, be inserted in such two newspapers as shall have been appointed by the judge for the insertion of advertisements under the 17th rule hereof. And the Clerk of Records and Writs shall not give his certificate that the docket of the inrolment of any such order is correct, unless the newspapers containing such notices be produced to him when the docket of such inrolment is presented to him for inspection.*

Inrolment of order and caveat to stay inrolment.

23. *No order for confirming a scheme shall be inrolled* until the expiration of thirty days from the day of the same having been pronounced, exclusive of vacations.*

* See now note (*a*) to Ord. LVIII. 2 (part 2).

24. *No caveat shall be entered to stay the inrolment* of any order for confirming a scheme, but every such order may be inrolled at the expiration of thirty days from the day of the same being pronounced, unless in the meantime a petition for a rehearing shall have been presented, and an order for setting down such petition obtained and served, such thirty days to be exclusive of vacations.*

Rehearing.

25. *No petition for a rehearing either before the same judge or before the Lord Chancellor or the Lords Justices, of the case on which any order for confirming or order refusing to confirm a scheme has been made, shall, unless by the special leave of the Lord Chancellor or the Lords Justices, be presented after the expiration of thirty days, exclusive of vacations, from the day on which such order was pronounced, notwithstanding that such order may not have been inrolled.*

Who may petition for rehearing.

26. *Where an order has been made for confirming a scheme, no person who has neither entered an appearance as aforesaid, nor by virtue of such special leave as aforesaid been heard in opposition to the confirmation of the scheme, shall be at liberty to present a petition for rehear-*

ing before the same judge or before the Lord Chancellor or the Lords Justices, unless the Lord Chancellor or the Lords Justices shall, by special order to be applied for by motion on notice to the company to be served on their solicitor or at their principal office, give leave to such person to present a petition for a rehearing.

30 & 31 Vict. c. 127, s. 17.

27. *Where any petition for a rehearing of a petition for confirmation of a scheme is presented, the same certificate of counsel, the same subscription by the petitioner or his solicitor with respect to costs, and the same deposit, shall be requisite as are required for a rehearing when a decree has been made at the hearing of a cause.**

How to petition.

28. *The inrolment of a scheme in pursuance of the 18th section of the said Act shall be effected in the same manner as the inrolment of a deed directed by statute to be inrolled in the Court of Chancery.*

Inrolment of deed.

* See now Ord. LVIII. r. 2, *post* (pt. II).

Leave to present a petition of rehearing under Rule 26, was refused in *Re Devon Railway Company*, W. N. (1868) 238.

XVIII. The scheme when confirmed shall be enrolled in the Court (*m*), and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by parliament.

(*m*) An application by a judgment creditor to restrain a company from enrolling an order confirming a scheme was granted, *Re Devon and Somerset Railway*, L. R. 6 Eq. 615.

XIX. Notice of the confirmation and enrolment of the scheme shall be published in the Gazette.

Notice of confirmation of scheme.

XX. The company shall at all times keep at their principal office printed copies of the scheme, when confirmed and enrolled, and shall sell such copies to all persons desiring to buy the same at a reasonable price, not exceeding sixpence for each copy.

Company to keep printed copies of scheme for sale.

If the company fail to comply with this provision they shall be liable to a penalty not exceeding twenty pounds, and to a further penalty not exceeding five pounds for every day during which such failure continues after the

Penalty for neglect.

30 & 31 Vict. c. 127, s. 20.

first penalty is incurred, which penalties shall be recovered and applied as penalties under "The Railways Clauses Consolidation Act, 1845," are recoverable and applicable.

Provision for cases where railways or part in Scotland.

XXI. Where a company whose principal office is situate in England have a railway or part of a railway in Scotland the following provisions shall have effect:

(1). Any scheme under this Act shall be filed in the Court of Chancery* in England;

* See Judicature Act, 1873, s. 34 (2).

(2). Where, after the filing of the scheme, any person who is not amenable to the jurisdiction of the Court of Chancery* in England brings any action against the company in Scotland, the Court of Session may, on the application of the company by petition in a summary way, sist, stay, or interdict the same on such terms as the Court thinks fit;

(3). Notice of the filing of the scheme shall be published in the "Edinburgh Gazette," and after such publication no diligence against the property of the company in Scotland shall be available for any person who is not amenable to the jurisdiction of the Court of Chancery in England without the leave of the Court of Session, to be obtained on petition in a summary way.

In this section the term "Court of Session" means either division of the Court of Session, or in time of vacation the Lord Ordinary officiating on the Bills.

General orders for regulation of practice in Court of Chancery.

XXII. The Lord Chancellor of Great Britain, with the advice and assistance of the Lords Justices of the Court of Appeal in Chancery, the Master of the Rolls, and the Vice-Chancellors, or any two of those judges, and the Lord Chancellor of Ireland, with the advice and assistance of the Lord Justice of Appeal in Chancery and the Master of the Rolls, or one of them, may from time to time make general orders for the regulation of the practice of the Courts of Chancery in England and Ireland respectively under this Act (*n*).

(*n*) The Order of 24th January, 1868, provided as to the general practice under this Act as follows :— 30 & 31 Vict. c. 127, s. 22.

33. *All orders made in chambers under "The Railway Companies Act, 1867," shall be drawn up in chambers unless specially directed to be drawn up by the registrar, and shall be entered in the same manner and in the same office as other orders drawn up in chambers.* Orders in chambers under the Act.

34. *In cases not expressly provided for by the said Act or by the rules of this order, the General Orders and practice of the Court (including the course of proceeding and practice in the judges' chambers, and the course of proceeding and practice as to rehearings before the same judge, or before the Lord Chancellor or Lords Justices) shall, so far as such General Orders and practice are applicable and not inconsistent with the said Act or this order, apply to all proceedings in the Court of Chancery under the said Act.* General practice applicable.

35. *The power of the Court and of the judge in chambers to enlarge or abridge the time for doing any act or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, shall be the same in proceedings in Chancery under the said Act, as in proceedings under the ordinary jurisdiction of the Court.* Powers of judge in chambers.

36. *Solicitors shall be entitled to charge and be allowed the fees set forth or referred to in the 1st schedule * hereto unless the Court or judge shall otherwise specially direct.* Solicitor's fees.

* *I.e.*, fees on the higher scale, see Order as to Fees, pt. II., *post.*

37. *The fees of Court set forth and referred to in the 2nd schedule hereto † shall be paid in relation to proceedings in Chancery under the said Act, and shall be collected by means of stamps in manner provided by the General Orders of the Court.* Fees of Court.

† Superseded by Orders as to Fees, pt. II., *post.*

38. *The general interpretation clauses contained in the Consolidated Orders of the Court of Chancery shall extend and apply to this order, and this order shall be deemed one of the General Orders of the Court.* Order to be in General Order.

39. *This order shall come into operation on Monday, the 3rd day of February, 1868, and shall apply to all schemes* Date of order.

30 & 31 Vict. c. 127, s. 22.

filed under the said Act, and to all proceedings in Chancery to be had under the same Act, provided always that all proceedings taken under the said Act before this order shall have come into operation shall have the same validity as they would have had if this order had not been made.

Loan Capital.

Priority of mortgages.

XXIII. All money borrowed or to be borrowed by a company on mortgage or bond or debenture stock under the provisions of any Act authorising the borrowing thereof shall have priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act: Provided always, that this priority shall not affect any claim against the company in respect of any rentcharge granted or to be granted by them in pursuance of "The Lands Clauses Consolidation Act, 1845," or "The Lands Clauses Consolidation Acts Amendment Act, 1860," or in respect of any rent or sum reserved by or payable under any lease granted or made to the company by any person in pursuance of any Act relating to the company which is entitled to rank in priority to, or *pari passu* with, the interest or dividends on the mortgages, bonds, and debenture stock; nor shall anything hereinbefore contained affect (*o*) any claim for land taken, used, or occupied by the company for the purposes of the railway, or injuriously affected by the construction thereof, or by the exercise of any powers conferred on the company.

(*o*) These words only relate to the contents of *this section*, and landowners are not exempted from the operation of the previous clauses of the Act, *Re Cambrian Railway Company*, L. R. 3 Ch. 278.

Sections XXIV.—XXXV.

[Sections 24—26 relate to the issue of railway debenture stock, subject to the provisions of the Companies Clauses Act, 1863. By sections 27—29, railway companies may issue shares or stock at a discount. Section 30 relates to the audit of railway accounts. By sections 31—35 the provisions as to abandonment of railways under stat. 13 & 14 Vict. c. 83, are amended, and it is provided that on the abandonment of a railway being authorised, the parliamentary deposit shall be paid out to the persons who would have been entitled to it if the railway had been opened, see 8 & 9 Vict. c. 20, p. 61, *ante*.

[Section 36 amended s. 85 of 8 & 9 Vict. c. 18. See marginal note, p. 58, *ante*.] 30 & 31 Vict. c. 127, ss. 36, 37.

[Section 37 relates to the costs of arbitrations as to lands taken under the Lands Clauses Act.]

THE PARTITION ACT, 1868.

31 & 32 VICT. CAP. 40.

An Act to amend the Law relating to Partition.

[*25th June*, 1868.

BE it enacted, &c., as follows: 31 & 32 Vict. c. 40.

I. This Act may be cited as the Partition Act, 1868. Short title.

II. In this Act the term "the Court" means the Court of Chancery in *England*,* the Court of Chancery in *Ireland*, the Landed Estates Court in *Ireland*, and the Court of Chancery of the County Palatine of *Lancaster*, within their respective jurisdictions. As to the term "the Court."

* Now the Chancery Division, Judicature Act, 1873, s. 34 (2).

III. In a suit for partition (*a*), where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds (*b*) would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request (*c*) of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions. Power to Court to order sale instead of division.

(*a*) As to the Act being retrospective, see *Lys* v. *Lys*, L. R. 7 Eq. 126; *Pryor* v. *Pryor*, L. R. 19 Eq. 595. Where partition not prayed for.

A sale was decreed, though the bill contained no prayer for a partition, *Aston* v. *Meredith*, L. R. 11 Eq. 601; but see *Teall* v. *Watts*, 19 W. R. 317, 40 L. J. Ch. 220, L. R. 11 Eq. 213.

Where property had been left to three persons, subject to an executory devise over, if all died without issue, the Court directed a sale, subject to the executory gift over, *Groves* v. *Carbert*, 29 L. T. N. S. 129. Sale of interest subject to executory devise over.

(*b*) A decree was made for sale of part of a property and partition of the rest, *Roebuck* v. *Chadebet*, L. R. 8 Eq. 127. Sale of part,

31 & 32 Vict. c. 40, s. 3.

or whole.

Where property consisting of a farmhouse and buildings and thirty acres of land was divisible into thirty-six shares, it was held that a sale ought to be directed under the 3rd section, on account of the nature of the property and the number of the parties interested, and because in the opinion of the Court a sale would be more beneficial for the parties interested than a division among them, *Drinkwater* v. *Ratcliffe*, 20 L. R. Eq. 528.

Request of infant or married woman.

(*c*) The decree was prefaced by a declaration of the request of infants by their counsel, *Grove* v. *Comyn*, L. R. 18 Eq. 387 ; see also *France* v. *France*, 13 L. R. Eq. 173 ; and *Higgs* v. *Dorkis*, *ibid.*, 280, where the plaintiff was a married woman ; *Davey* v. *Wietlisbach*, L. R. 18 Eq. 269.

Sale on application of certain proportion of parties interested.

IV. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions (*d*).

What discretion the Court has under this section.

(*d*) "The 4th section seems to me to be perfectly distinct from the 3rd, "for whereas the 3rd section in terms applies only where the Court is satisfied that a partition is inconvenient and not beneficial for the parties, "there is no such condition inserted in the 4th section ; and whereas under "the 3rd section a discretionary power was given to the Court to order a "sale, if it thought a sale more beneficial than a partition, the 4th section "makes it imperative on the Court, in a certain state of circumstances, to "order a sale, and if less than half desire a partition, then the half requiring "the sale shall have the preponderating voice, and the Court shall be "bound to give them a sale wholly irrespective of the 3rd section. But "still there is a certain discretion left to the Court, so that the Court "can refuse a sale where it is manifestly asked through vindictive feeling, "or is on any other ground unreasonable,"—Per Lord Hatherley, in *Pemberton* v. *Barnes*, L. R. 6 Ch. 685 ; see *Wilkinson* v. *Joberns*, L. R. 16 Eq. 14, where it was held that though the owner of one moiety of property was yearly tenant of the whole, and occupied it for commercial purposes, and also resided thereon, this was no sufficient reason against a sale under the section.

Consequential directions.

Where one of two tenants in common has expended money in improvements of his moiety, an inquiry may be directed as to how far the value of the estate has been increased by such expenditure, *Parker* v. *Trigg*, W. N. (1874) 27.

Any party may call for sale unless other parties purchase share of party desiring sale.

V. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties

interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions (*e*). 31 & 32 Vict. c. 40, s. 5.

(*e*) The 3rd and 4th sections having provided that a decree for sale shall be made when a sale is beneficial, or when persons entitled to more than a moiety of the property ask for it, the 5th section is an extension, not a limitation, of those sections, and provides that any party, plaintiff, or defendant may ask for and have a sale whether the Court considers it beneficial or not, unless the other parties interested undertake to purchase the applicant's share, *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528, 531 (where it was held that an undertaking of a married woman, separated from her husband, would not be valid to stop a sale so asked for). If the other parties undertake to purchase the applicant's share, and so prevent the sale of the property as a whole, the applicant for the sale of the property as a whole may decline to sell his share, and may withdraw his application and ask for a partition, *Williams* v. *Games*, 10 L. R. Ch. 204. See, however, Lord Hatherley's remarks as to the connection of ss. 3, 4, 5, 6 in *Pemberton* v. *Barnes*, L. R. 6 Ch. 685. Sale on application of any party entitled.

VI. On any sale under this Act the Court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale (*f*), on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters, as to the Court seem reasonable. Authority for parties to bid.

(*f*) See *Pennington* v. *Dalbiac*, 18 W. R. 684.

VII. Section Thirty of the Trustee Act, 1850,* shall extend and apply to cases where, in suits for partition, the Court directs a sale instead of a division of the property. Application of Trustee Act.

* Pp. 96, 97, *ante*.

VIII. Sections Twenty-three to Twenty-five (both inclusive) of the Act of the session of the nineteenth and twentieth years of Her Majesty's reign (chapter one hundred and twenty), "to facilitate leases and sales of settled estates,"† shall extend and apply to money (*g*) to be received on any sale effected under the authority of this Act (*h*). Application of proceeds of sale.

† P. 228, *ante*.

(*g*) Where real estate to a share of which infants were entitled was sold under the decree in a partition suit, it was *held* that the proceeds of sale Proceeds of sale, realty.

31 & 32 Vict. c. 40, s. 8.

must be treated as realty, by force of this section, *Foster* v. *Foster*, L. R. 1 C. D. 588 (where *Steed* v. *Preece*, L. R. 18 Eq. 192, is distinguished).

Money paid to trustees.

(*h*) In accordance with this section, trustees were, under section 23 of the Settled Estates Act, appointed to receive the money, *Hayward* v. *Smith*, W. N. (1869) 37; but see *Aston* v. *Meredith*, L. R. 13 Eq. 492.

Parties to partition suits.

IX. Any person who, if this Act had not been passed, might have maintained a suit for partition may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties (*i*); and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the Court may direct such inquiries as to the nature of the property, and the persons interested therein and other matters, as it thinks necessary or proper

Further consideration.

with a view to an order for partition or sale being made on further consideration (*j*); but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the Court to add to the decree or order (*k*).

Service on parties not before the Court.

(*i*) The Act does not compel the Court to act in the absence of any parties interested, *Dodds* v. *Gronow*, 17 W. R. 511; *Lester* v. *Alexander*, W. N. (1869), 75; and where a decree for sale had been made in the absence of such parties who were out of the jurisdiction, the Court refused to allow the decree to be acted on in their absence, and directed notice to be given to them by advertisement, *Peters* v. *Bacon*, L. R. 8 Eq. 125; and when the parties out of the jurisdiction were interested in the legal estate it was held that they must be served, *Hurry* v. *Hurry*, 18 W. R. 829; but not where the legal estate was in trustees who were before the Court, *Silver* v. *Udall*, L. R. 9 Eq. 227. In a later case it was held that an order for sale of real estate under the Act, could not be made at the hearing, unless all persons interested in the property were parties to the cause, *Mildmay* v. *Quicke*, L. R. 20 Eq. 537; see now *Lawe* v. *Stoney*, W. N. (1876) 141, Ord. XXXIII., *post*, and note thereto; but the inquiries mentioned in this section may be dispensed with where a good title can be made without them, *Rawlinson* v. *Miller*, L. R. 1 Ch. Div. 52. Where real estate was held by a complicated title under which the parties interested were very numerous and unborn issue might become entitled to legal estates, it was held that,—all persons in existence who were interested in the estate being parties to a suit for partition, and the title being proved at the hearing,—an immediate decree for sale might be made without any preliminary inquiry; that a declaration might be made that the parties to the suit were, and that unborn issue upon coming into existence would be, trustees of their shares and interests within the meaning of the Trustee Act, 1850; *Lees* v. *Coulton*, L. R. 20 Eq. 20.

Inquiries dispensed with.

Unborn issue.

(*j*) These words do not necessarily imply that there must be a further consideration in Court, *Powell* v. *Powell*, L. R. 10 Ch. 130 ; the order may be made under Ord. XL., r. 11 (Pt. II., *post*), *Gilbert* v. *Smith*, 24 W. R. 568. 31 & 32 Vict. c. 40, s. 9.

(*k*) The decree was directed to be served on all parties, whether in or out of the jurisdiction, in *Teall* v. *Watts*, 41 L. J. Ch. 220, L. R. 11 Eq. 213. Service of a decree may be dispensed with under Cons. Ord. XXXV., r. 18 (p. 143, *ante*). Further hearing. Service of decree.

X. In a suit for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing (*l*). Costs in partition suits.

(*l*) For the old rule as to costs in partition suits, see Morgan & Davey on Costs, p. 172. In *Landell* v. *Baker*, L. R. 6 Eq. 268, each party was ordered to bear his own costs of the hearing ; but see *Cannon* v. *Johnson*, L. R. 11 Eq. 90 ; and where the rights of the persons interested are equal and the sale is equally for the advantage of every one, so that the defendants get the advantage of the plaintiff's action and of the costs which he has incurred, which are usually the greatest, the costs of all parties ought to come out of the estate, *Miller* v. *Marriott*, L. R. 7 Eq. 1 ; *Leach* v. *Westall*, 17 W. R. 313 ; and in later cases all the costs of all parties have been declared to be a lien on the proceeds of the sale, *Osborn* v. *Osborn*, L. R. 6 Eq. 338, and to be paid out of the estate, *Simpson* v. *Ritchie*, L. R. 16 Eq. 103. Old rule. Costs when paid out of the estate.

XI. Sections Nine, Ten, and Eleven of the Chancery Amendment Act, 1858,* relative to the making of General Orders, shall have effect, as if they were repeated in this Act, and in terms made applicable to the purposes thereof. As to General Orders under this Act. * See p. 247, *ante*.

XII. In *England* the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this Act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of the County Courts Act, 1865. Jurisdiction of County Courts in partition. 28 & 29 Vict. c. 99.

THE PARTITION ACT, 1876.

39 & 40 Vict. c. 17.

An Act to amend the Partition Act, 1868. 39 & 40 Vict. c. 17.

[27*th June*, 1876.

I. This Act may be cited as the Partition Act, 1876, and shall be read as one with the Partition Act, 1868. Short title.

II. This Act shall apply to actions pending at the time of the passing of this Act as well as to actions commenced after the passing thereof, and the term "action," includes a suit, and the term "judgment" includes decree or order. Application of Act.

39 & 40 Vict. c. 17.

Power to dispense with service of notice of decree or order in special cases.

III. Where in an action for partition it appears to the Court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the Court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service* on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the Court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the Judge in Chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the Court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the Court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the Court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

* See note (*i*), p. 292.

Proceedings where service is dispensed with.

IV. Where an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the Court, the following provisions shall have effect:—

(1.) The proceeds of sale shall be paid into court to abide the further order of the Court:

(2.) The Court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:

(3.) The Court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously

come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made:

(4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the Court shall distribute the proceeds in accordance with the rights of those persons:

(5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservations (if any) as to the Court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the Court to have any primâ facie rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

Provision for case of successive sales in same action.

V. Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

Request by married woman, infant, or person under disability.

VI. In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability;* but the Court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit.

* See note (*c*), p. 290.

Prayer for partition unnecessary.

VII. For the purposes of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary† to claim a partition.

† See note (*a*), p. 289.

THE DEBTORS ACT, 1869.

32 & 33 Vict. c. 62.

An Act for the Abolition of Imprisonment for Debt, for the punishment of fraudulent Debtors, and for other purposes. [*9th August*, 1869.

32 & 33 Vict. c. 62.

Be it enacted, &c., as follows:—

Preliminary.

Short title.

I. This Act may be cited for all purposes as "The Debtors Act, 1869."

Extent of Act.

II. This Act shall not extend to Scotland or Ireland.

Commencement and construction of Act.

III. This Act shall not come into operation until the day on which the Bankruptcy Act, 1869, comes into operation, which day is hereinafter referred to as the commencement of this Act, and words and expressions defined or explained in The Bankruptcy Act, 1869, shall have the same meaning in this Act.

PART I.

Abolition of Imprisonment for Debt.

No imprisonment for debt except—

IV. With the exceptions hereinafter mentioned, no person shall after the commencement of this Act, be arrested or imprisoned (*a*) for making default in payment of a sum of money (*b*).

There shall be excepted from the operation of the above enactment:—

(1) Upon default in payment of a penalty;

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract (*c*):

(2) Under order of justices;

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:

(3) By trustee;

3. Default by a trustee or person acting in a fiduciary capacity (*d*) and ordered to pay by a Court of equity any sum in his possession or under his control (*e*).

(4) By attorney;

4. Default by an attorney or solicitor in payment of

costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order (*f*): 32 & 33 Vict. c. 62, s. 4.

5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order: (5) In payment of income to creditors

6. Default in payment of sums in respect of the payment of which orders are in this Act authorized* to be made: (6) In payment under this act.

* See sect. V., *infra*.

Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year (*g*) and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money. No imprisonment beyond a year.

(*a*) The power of the Court to imprison for contempt of Court is not affected by this Act, see *Harvey* v. *Hall*, L. R. 11 Eq. 31, and Ord. XLII. r. 5 (pt. II., *post*), and notes thereto. Imprisonment for contempt of Court.

The rules cited in the next note distinguish between orders and decrees which can be enforced by process of contempt, and those which cannot.

Cons. Ord. XLII. has the following provisions as to special contempt of Court by abuse of its officers:— What is *special* contempt.

1. *Officers and attendants upon the Court, suitors, and witnesses, are to have privilege*, eundo, redeundo, et morando, *for their necessary attendance, but not otherwise, and where any of them are arrested at such times of necessary attendance, it is a contempt of Court.* Cons. Ord. XLII. Rule 1. Special contempt by arresting officers of Court.

2. *Any one who uses violence or abusive language to a person serving the process or orders of the Court, or uses scandalous or contemptuous words against the Court or the process thereof, shall be liable to be committed upon motion, or notice to the person so offending.* By violent language.

See *Price* v. *Hutchinson*, L. R. 9 Eq. 534, as to abusive words against officers of the Court. As to publication by a newspaper of evidence in a cause with comments, before the hearing, being a contempt of Court, see *Tichborne* v. *Tichborne*, L. R. 7 Eq. 55; *Daw* v. *Eley*, *Ibid.* 49; *General Exchequer Bank* v. *Horner*, W. N. (1868) 259; but see *Re London Hour Company*, 16 W. R. 474; publication without comment of an ex parte petition containing charges of fraud was held a contempt, *Re Cheltenham Carriage Company*, L. R. 8 Eq. 580; *Robson* v. *Dodds*, 17 W. R. 782. Special contempt.

32 & 33 Vict. c. 62, s. 4.

Extent of solicitor's privilege.

The privilege of a solicitor as officer of the Court extends to him when proceeding to attend an appointment with a person for whom he is acting in a suit (*Eyre* v. *Barrow*, 6 W. R. 761); or on his way to attend a summons at judge's chambers (*Re Jewitt*, 33 Beav. 559; and see *Attorney-General*, v. *Leathersellers' Company*, 7 Beav. 157; *Gibbs* v. *Phillipson*, 1 R. & M. 19; *Plomer* v. *Macdonough*, 1 De G. & S. 232; *Andrews* v. *Walton*, 1 M. & Gord. 280, and the other cases cited in Seton, 1238).

Party in contempt may take *defensive* proceedings.

A defendant in contempt may take any step necessary for his *defence*, *Fry* v. *Ernest*, 12 W. R. 97. Thus, he may be heard to show that proceedings subsequent to the order placing him in contempt were irregular, (*Morrison* v. *Morrison*, 4 Hare, 590; *King* v. *Bryant*, 3 M. & Cr. 191; and see *Wilson* v. *Bates*, *id.*, 197; *Hawkins* v. *Hall*, 1 Beav. 73; 4 M. & Cr. 280). Or he may apply for taxation of a bill of costs (*Newton* v. *Ricketts*, 11 Beav. 67), or except to a bill for scandal (*Everett* v. *Prythergch*, 12 Sim. 363).

A party in contempt should generally apply by *petition*, *Nicholson* v. *Squire*, 16 Ves. 259; but a plaintiff in contempt was, in *Futvoye* v. *Kennard*, 2 Giff. 110, held entitled to be heard on a *motion* to discharge an order made against him at chambers.

Waiver of contempt.

A contempt may be waived, *e. g.*, if the defendant is in contempt for want of sufficient answer, the plaintiff, by taking a step in the cause, waives the contempt, and cannot claim the costs of it, *Roberts* v. *Albert Bridge Company*, L. R. 8 Ch. 753.

Release of person imprisoned for contempt of court.

The Act makes this difference as to imprisonment for contempt, that a person imprisoned for contempt of Court, cannot, *after clearing his contempt*, be kept (under r. 5, *post*) in prison till he pays costs of the contempt, *Jackson* v. *Mawby*, L. R. 1 Ch. Div. 86; *secus*, where the contempt is not cleared, *S.* v. *L.* W. N. (1876) 220.

Privilege of bankrupt.

A person who is excepted from the operation of the section, and therefore liable to be attached, will, nevertheless, if he become a bankrupt, be protected pending the bankruptcy proceeding, *Cobham* v. *Dalton*, L. R. 10 Ch. 655; *secus*, where the attachment is not for payment of a sum of money, but for punishment, *Re Deere*, L. R. 10 Ch. 658.

Order 7 Jan. 1870, under Debtors' Act.

(*b*) The Order (under this Act) of 7th January, 1870 (which, by r. 22, came into operation on 11th January, 1870), distinguishing orders which can be enforced by process of contempt from those which cannot, provided as follows:—

Indorsement on decree which can be enforced by process of contempt.

Cons. Ord. XXIII. r. 10.

1. *The* 10*th Rule of the* 23*rd of the Consolidated General Orders shall be varied, and as varied shall be as follows:—*

*Every decree or order made in any suit or matter, requiring any person to do an act thereby ordered, shall state the time, or the time after service of the decree or order, within which the act is to be done; and upon the copy of the decree or order, which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or the effect following, viz.:— "If you, the within named A. B., neglect to obey this decree [or order] by the time therein limited you will be liable to to have your property sequestered for the purpose of compelling you to obey the same decree [or order] and you may also be liable to be arrested and committed * to prison."*

* See Ord. XLII. r. 5, pt. II., *post*).

2. *The 3rd Rule of the 29th of the Consolidated General Orders is hereby abrogated.* 32 & 33 Vict. c. 62, s. 4.

3. *Where any person is by a decree or order made in any suit or matter directed to pay money or costs in a limited time, and, after due service of such Decree or Order, refuses or neglects to make such payment according to the exigency of such decree or order, the person prosecuting such decree or order shall, at the expiration of the time limited for such payment, be entitled to a Commission of Sequestration* which may be issued by the Clerks of Records and Writs, without any special order, upon production of evidence to the same effect as that which would heretofore have been required on issuing a writ of attachment for default in making such payment.* Cons. Ord. XXIX. r. 3. Decrees for payment of money or costs to be enforced by sequestration.

* See Ords. XLII. and XLVII. (Pt. II., *post.*)

4. *The form of subpœna for costs mentioned in schedule E. to the Consolidated General Orders shall be varied by omitting therefrom the words "an attachment issuing against your person, and:" Provided always that where a subpœna is issued for costs payable under a decree or order, which states that payment thereof may be enforced by attachment, as mentioned in the 9th rule of this order, then the subpœna shall be in the form heretofore used.* Subpœna for costs to omit reference to attachment; Except under r. 9.

The following is the form referred to:

"Victoria," &c.

"To greeting.

"We command you [and every of you] that you pay or cause to be paid, immediately after the service of this writ, to or the bearer of these presents, £ costs (in a cause wherein A. B. [and others, *or*, another] is [*or*, are] plaintiff [*or*, plaintiffs], and C. D. [and others, *or* another] is [*or*, are] defendant [*or*, defendants]), *or* (in the matter of), [*as the case may be*], by our Court of Chancery adjudged to be paid by you, the said , under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment.

"Witness," &c.

"ROMILLY, M. R."

5. *Where any person is, by a decree or order made in any suit or matter, directed to pay costs, without a time being limited for such payment, and does not upon due service of a subpœna for such costs make such payment, the person to whom such costs are payable shall, immediately upon such default, be entitled to a Commission of* Payment of costs to be enforced by sequestration.

32 & 33 Vict c. 6, 2 s. 4.

Sequestration, which may be issued by the Clerks of Records and Writs without any special order, upon production of evidence to the same effect as that which would heretofore have been required on issuing a writ of attachment for default in making such payment.

Decree directing other act besides payment of money or costs, to be enforced by writ of attachment

6. *Where any person is by a decree or order made in any suit or matter directed to do any act other than or besides the payment of money or costs, and, after due service of such decree or order, refuses or neglects to do such act according to the exigency of the same decree or order, the person prosecuting such decree or order shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient person. And in case such person shall be taken or detained in custody under any such writ of attachment without obeying the same decree or order, then the person prosecuting the same decree or order shall, upon the sheriff's return that the disobedient person has been so taken or detained, be entitled to a Commission of Sequestration against his estate and effects. And in case the sheriff shall make the return* non est inventus *to such writ or writs of attachment, the person prosecuting such decree or order shall be entitled at his option, either to a Commission of Sequestration in the first instance, or otherwise to an order for the serjeant-at-arms, and to such other process as he was formerly entitled to upon a return* non est inventus *made by the commissioners named in a Commission of Rebellion issued for the non-performance of a decree or order.*

and sequestration;

or by order for serjeant-at-arms, &c.

See as to order for attachment after sequestration, *Harvey* v. *Hall*, L. R. 16 Eq. 324.

Imprisonment for non-payment of penalty.

(*c*) When the Debtors' Act allows imprisonment for default in payment of a penalty, it means a penalty for non-observance of a positive law, see *Middleton* v. *Chichester*, L. R. 6 Ch. 152, 155.

Fiduciary capacity.

(*d*) An Order of Court directing payment by A. to B., does not create a fiduciary capacity, *Ex parte Hodson*, L. R. 8 Ch. 231.

Defaulting trustee. Possession and control.

(*e*) A trustee who has not made away with trust funds, but has only neglected to get them in, is not a defaulting trustee within the section, for the money has not been in his possession or under his control, *Ferguson* v. *Ferguson*, L. R. 10 Ch. 661; but a trustee who has had the money in his possession or control is liable to imprisonment, though he has lost the money, and is not therefore strictly speaking contumacious in not paying, *Middleton* v. *Chichester*, L. R. 6 Ch. 152. An attachment, however, issued against a

trustee or an order directing the payment of a sum composed of principal and interest not distinguished, was discharged, inasmuch as the interest might not at any time have been in his possession or under his control, *ibid.* 32 & 33 Vict. c. 62, s. 4.

A trustee may be attached though the trust funds were only in his control jointly with another trustee, *Evans* v. *Bear*, L. R. 10 Ch. 77. Joint control.

The Order of 7 January, 1870, provides as to imprisonment of defaulting trustees and solicitors as follows :— Ord. 7 Jan., 1870.

7. *Where, by any decree or order, a trustee or person acting in a fiduciary capacity is ordered to pay in a limited time any sum of money in his possession or under his control, or a solicitor is ordered to pay in a limited time costs for misconduct as such solicitor, or to pay in a limited time a sum of money in his character of an officer of the court, and such trustee, person, or solicitor, after due service of such decree or order, neglects or refuses to pay such money or costs according to the exigency of such decree or order, the person prosecuting such decree or order shall, at the expiration of the time limited thereby for the performance thereof, be entitled at his option either to a Commission of Sequestration to be obtained in manner provided by the 3rd rule of this order, or (subject nevertheless as mentioned in rule 9) to the remedies to which under the 6th rule of this order he would have been entitled in the case of failure to do some act directed by the decree or order other than payment of money.* Process against trustee or solicitor.

8. *Where, by any decree or order, a solicitor is ordered to pay costs for misconduct as such solicitor, without a time being limited for such payment, and does not, upon due service of a subpœna for such costs, make such payment, the person to whom such costs are payable shall, immediately upon such default, be entitled, at his option, either to a Commission of Sequestration to be obtained in manner provided by the 5th rule of this order, or (subject nevertheless as mentioned in the next following rule,) to a writ or writs of attachment and such other process as has heretofore been applicable in case of non-payment of costs recoverable by subpœna.* Solicitor in default liable to sequestration or attachment.

9. *Any decree or order directing any such trustee, person, or solicitor as mentioned in the last two preceding rules to make any such payment as in the same rules mentioned, shall state that such payment may be enforced* Such liability to be mentioned in the order.

32 & 33 Vict. c. 62, s. 4.

by attachment, and unless the decree or order contains such statement, no attachment shall be issued for enforcing such payment without leave of the Court or the judge in chambers, to be applied for by motion or summons, which application may be granted ex parte, upon the Court or judge being satisfied that the case comes within the exceptions contained in the 4th section of "The Debtors Act, 1869," unless the Court or judge thinks fit to require notice of such application to be served.

Ord. 7 Jan. 1870. Default by solicitor "in "character of "officer of "Court."

In payment of "sum of money" or stock.

(*f*) See last note as to the process of proceeding by attachment against solicitors or trustees under the rules made in pursuance of this Act.

Default by a solicitor in payment of a balance due upon taxation is within the section, and an attachment may be issued, *Re Rush*, L. R. 9 Eq. 147; and the same was held where a solicitor is client of another solicitor, *Re Barfield*, 19 W. R. 466; but in another case, where a solicitor was liable to pay costs as an ordinary litigant, it was held not to be within the section, *Re Hope*, L. R. 7 Ch. 523.

The words "sum of money" includes stock, *Digby* v. *Turner*, 21 W. R. 471; see *Middleton* v. *Chichester*, L. R. 6 Ch. 152.

Where a solicitor had been attached for not delivering his bill within the time specified in an order, and it subsequently appeared that money was due from him to his client, it was held that he could not be detained in custody until he should pay the money so due, but for that purpose a separate motion on notice was necessary, *Re Powell*, 1 N. R. 461.

(*g*) An order is required for the discharge of the debtor, *Re Thompson*, 30 L. T. N. S. 783.

Saving of power of committal for small debts.

V. Subject to the provisions hereinafter mentioned, and to the prescribed rules (*h*), any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt (*i*) or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court.

Provided—(1.) That the jurisdiction by this section given of committing a person to prison shall, in the case of any Court other than the Superior Courts of law and equity, be exercised only subject to the following restrictions; that is to say,

(*a.*) Be exercised only by a judge or his deputy, and by an order made in open Court and showing on its face the ground on which it is issued;

(*b.*) Be exercised only as respects a judgment of a Superior Court of law or equity when such judgment does not exceed fifty pounds, exclusive of costs (*j*);

(c.) Be exercised only as respects a judgment of a county court by a county court judge or his deputy. 32 & 33 Vict. c. 62, s. 5.

(2.) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same. Where debtor had the means to pay.

Proof of the means of the person making default may be given in such manner as the Court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules (*h*).

Any jurisdiction by this section given to the Superior Courts may be exercised by a judge sitting in chambers, or otherwise, in the prescribed manner (*h*).

For the purposes of this section any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order.

Persons committed under this section by a Superior Court may be committed to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*, and every order of committal by any Superior Court shall, subject to the prescribed rules (*h*), be issued, obeyed, and executed in the like manner as such writ.

This section, so far as it relates to any county court, shall be deemed to be substituted for sections ninety-eight and ninety-nine of the County Court Act, 1846, and that Act and the Acts amending the same shall be construed accordingly, and shall extend to orders made by the county court with respect to sums due in pursuance of any order or judgment of any Court other than a county court.

No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the

32 & 33 Vict. c. 62, s. 5.

person imprisoned, in the same manner as if such imprisonment had not taken place.

Any person imprisoned under this section shall be discharged out of custody upon a certificate signed in the prescribed manner to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned, together with the prescribed costs (if any).

Power under certain circumstances to arrest defendant about to quit England.

VI. After the commencement of this Act a person shall not be arrested upon mesne process in any action.

Where the plaintiff in any action in any of Her Majesty's Superior Courts of law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge of one of those Courts, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison.

(*h*) The Order, made under this Act, dated 7 January, 1870, provides as follows as to the practice of committal to prison under section 5 :—

Order (under Debtors Act) 7 Jan. 1870. Application

10. *Every application to commit to prison under the*

5th section of "The Debtors Act, 1869," shall be made by motion or notice, and the practice applicable to motions to commit for breach of an injunction shall, so far as the same is not inconsistent with the said Act or with anything in these rules, be applicable to such applications.

32 & 33 Vict. c. 62, s. 6.

to commit to be made on notice.

11. The Court, upon the hearing of any such application, may, if it shall see fit so to do, instead of refusing or granting the application, adjourn the same, and either give leave to adduce further evidence, or direct an inquiry in chambers, as to the means of the person making default, or require the production and oral examination before itself of the person making default and any persons who have given evidence against or in support of the application, or of such of them as the Court may think fit, in the same manner as such production and oral examination might be required at the hearing of a cause.

Discretion of Court.

12. In case any such inquiry as aforesaid shall be directed, the general course of proceeding and practice at the judge's chambers, as provided by statute 15 & 16 Victoria, c. 80, and the General Orders of the Court relative thereto, shall apply to all proceedings under such inquiry.*

Application of practice in chambers.

* P. 125, *ante*.

13. The Court, in making an order for commital to prison under the said 5th section, may either make such imprisonment determinable on payment of the whole sum in respect of which the person to be imprisoned is in default, together with such costs as the Court shall think fit, or may order the debt to be paid by such instalments as the Court shall think fit, and make the imprisonment determinable on payment of such costs, and such of the said instalments as the Court shall think fit, and in either of such cases the Court, if it shall think fit, may direct payment of a sum in gross in lieu of taxed costs.

Payment by instalments.

14. No application made under the said 5th section nor any order made thereon, shall in any manner vary or suspend any of the remedies which the person prosecuting the decree or order which has been disobeyed, would, if no such application had been made, have been entitled to against the property of the person disobeying the same

Application for attachment not to vary or suspend remedy against property.

32 & 33 Vict. c. 62, s. 6.

decree or order, but the person prosecuting such decree or order may proceed to avail himself of such remedies without any regard to such application, or to any order made thereon, except so far as by consent, he may, by such last-mentioned order, be expressly restrained from availing himself of such remedies.

Form of orders for committal.

15. *Orders of commital may be in the form A.* 1, *or A.* 2, *in the schedule hereto, as the case may be, with such variations as the circumstances of the case may require, and an office copy of each such order shall be delivered to the sheriff or other officer required to execute the same. Office copies of any such order may be delivered concurrently to different sheriffs for execution in different counties. Every such office copy as aforesaid shall be indorsed by the Clerks of Records and Writs, with the direction of the sheriff or other officer by whom the same is to be executed. The sheriff and officer shall be entitled to the same fees in respect of an order of committal, as are now payable upon a writ of* capias ad satisfaciendum, *issued out of Her Majesty's Courts of Common Law.*

A. 1.

Upon motion, &c., this Court doth order that the said A. B. do pay to the said [the sum of £ , as and for] his costs of and incident to this application and this order, and further that the said A. B., for default in payment of the sum of £ mentioned in the said decree [*or*, order] of the day of , 18 , be committed to prison for the term of six weeks from the date of his arrest, including the day of such date, unless he shall sooner pay the said sum of £ , and sheriff's fees for the execution of this order, and the costs hereinbefore directed to be paid [*or*, and the said sum of £ for costs]. And it is ordered that any sheriff or officer to whom an office copy of this order shall be delivered, after being directed to him by the Clerks of Records and Writs, do take the said A. B. for the purpose aforesaid if he be found within his bailiwick.

A. 2.

Upon motion, &c., this Court doth order that the said A. B. do pay to the said [the sum of £ , as and for] his costs of and incident to this application and this order, and further that the said A. B., for default in payment of the sum of £ mentioned in the said decree [*or*, order] of the day of , 18 , be committed to prison for the term of six weeks from the date of his arrest, including the day of such date, unless he shall sooner pay the sheriff's fees for the execution of this order and the costs hereinbefore directed to be paid [*or*, and the sum of £ hereinbefore directed to be paid for costs], and the sum of £ , part of the said sum of £ . And it is ordered that the said A. B. do pay

[*state to whom or to what account to be paid*] the sum of £ , the residue of the said sum of £ , by equal instalments on [*state times of payment*]. And it is ordered that any sheriff or officer to whom an office copy of this order shall be delivered, after being directed to him by the Clerks of Records and Writs, do take the said A. B. for the purpose aforesaid, if he be found within his bailiwick. 32 & 33 Vict. c. 62, s. 6.

16. *The sheriff or other officer to whom an order of committal is directed as aforesaid, shall, within two days after the arrest, indorse upon the office copy of the order delivered to him the true date of such arrest, and return the same so indorsed to the solicitor of the person prosecuting the decree or order, or to such person himself, if he acts in person.* Sheriff to indorse date of arrest.

17. *Upon payment of the sum or sums in that behalf mentioned in the order of committal, including the sheriff's fees, and the costs or gross sum in lieu of costs made payable by the order, the person committed shall be entitled to a certificate in the form B, in the schedule hereto, or to the like effect, signed by the solicitor of the person prosecuting the decree or order which has been disobeyed, or if such person be acting in person, then signed by him, and attested by a solicitor or justice of the peace.* Certificate of payment.

B.

A. *v.* B.

[*or*, In the matter of .]

I certify that A. B., now in the gaol of , upon an order of the High Court of Chancery, dated the day of , 18 , made in the above cause [*or*, matter] until payment of £ , has paid the said sum, together with the [the sum of £ for] costs mentioned in the said order, and sheriff's fees.

18. *In case any order is made under the 5th section of the said Act for payment of a sum of money by instalments, and the person imprisoned shall, after his discharge from prison, neglect or refuse to pay the subsequent instalments, or any of them, the person prosecuting the decree or order for disobedience to which the committal was ordered, shall, in addition to his remedies against the property of the person making default, be entitled to enforce payment of such subsequent instalments by attachment, as in the case of disobedience to an order direct-* Disobedience to order for payment by instalments.

32 & 33 Vict. c. 62, s. 6.

ing the performance of some act other than payment of money.

Committal for debt or costs under 50*l.*

(*i*) The word "debt" includes "costs," *Hewitson* v. *Sherwin*, 18 W. R. 802 ; *S.* v. *L.*, W. N. (1876) 220, but a person imprisoned for contempt of Court cannot, after he has cleared his contempt, be kept in prison till he pays the costs, see note (*f*), p. 300, *ante*.

(*j*) For form of order under this clause, see *Rogers* v. *Rogers*, 19 W. R. 317, 374.

Discharge of persons in custody at the commencement of this Act.

VII. Where any person is, at the commencement of this Act, in custody in pursuance of a writ, attachment, or other process in any case in which he would not be liable to be arrested or imprisoned after the commencement of this Act, such person shall at the commencement of this Act, be discharged from such custody without payment of any fees, but his arrest, imprisonment, or discharge shall not affect the creditor's rights or remedies for enforcing the payment of any money due to him, or deprive the creditor of the benefit of any charge or security on any property of the debtor.

Where at the commencement of this Act special bail has been given in any action the defendant in which after the commencement of this Act cannot be imprisoned on making default in satisfying the judgment recovered against him in such action, the condition of such bail, instead of being that the judgment shall be satisfied or the defendant rendered to prison, shall be deemed to be that the defendant shall not go out of England without leave of the Court.

Sequestration against property.

VIII. Sequestration against the property of a debtor may, after the commencement of this Act, be issued by any Court of equity in the same manner as if such debtor had been actually arrested (*k*).

(*k*) See *Sykes* v. *Dyson*, L. R. 9 Eq. 228, and Order XLVII. (pt. II., *post*).

Saving for Bankruptcy Act, 1869.

IX. Nothing in this part of this Act shall in any way affect any right or power, under The Bankruptcy Act, 1869, to arrest or imprison any person.

Definition of "prescribed."

X. In this part of this Act the term "prescribed" means as follows :—

As respects the Superior Courts of common law, pre-

scribed by general rules to be made in pursuance of The Common Law Procedure Act, 1852; 32 & 33 Vict. c. 62, s. 10.

As respects the Superior Courts of equity, prescribed by general rules and orders to be made in pursuance of the Act of the session of the fifteenth and sixteenth years of the reign of Her present Majesty, chapter eighty; *

* See p. 132, *ante*.

As respects the County Courts, prescribed by general rules to be made under the County Court Act, 1857; and

As respects any other Court, prescribed by the rules to be made, with the approval of the Lord Chancellor, by the persons having power to make rules in relation to the practice of such Court; or if there be no such persons, by the judge of such Court;

And general rules and orders may respectively be made by such authorities as aforesaid, for the purpose of carrying into effect this part of this Act.

Part II.

Punishment of Fraudulent Debtors.

[By sect. 11 any bankrupt, or person whose affairs are in liquidation, is to be guilty of misdemeanour, and to be liable to imprisonment, not exceeding two years, for certain specified acts of concealment and fraud.]

[Sect. 12 and 13 enact a penalty for absconding with property and for fraudulently obtaining credit.

[By sect. 14 a false claim in any bankruptcy or liquidation is be to punishable as a misdemeanour.]

[By sect. 15 an arranging or compounding debtor is to remain liable for fraudulent debts.]

[By sect. 16–20 the mode of prosecution under the preceding sections is pointed out.]

[Sect. 21 and 22 relate to disqualifications of mayors, &c., and justices of the peace in case of bankruptcy.]

[By sect. 23 punishments under this Act are to be cumulative.]

Part III.

Warrants of Attorney, Cognovits, and Orders for Judgment.

[Sect. 24–27 relate to the manner of executing warrants of attorney and cognovits, and to the filing of the same.]

32 & 33 Vict. c. 62. The Order of 7th January, 1870, cited in the notes, p. 296—300, *supra*, contains the following miscellaneous provisions :—

Ord. 7 Jan., 1870, miscellaneous provisions.

Rule 19. General practice under Act.

19. *The general practice of the Court shall, in all cases not provided for by "the Debtors Act,* 1862," *or these rules, and so far as the same is applicable, and not inconsistent with the said Act or these rules, apply to all proceedings under the 4th and 5th sections of the said Act.*

Rule 20. Solicitors' fees.

20. *The charges to be allowed to solicitors for duties performed in respect of such proceedings as last aforesaid, and the fees of Court in respect of the same proceedings, shall be the same as those allowable and payable in respect of other proceedings of the same nature in the cause or matters in which such proceedings respectively are taken.*

Rule 21. To be read with General Orders.

21. *This order shall be read and construed as part of the General Consolidated Orders of the Court, and the interpretation clause in the same Consolidated General Orders contained shall apply to the rules of this order.*

22. *This order shall come into operation on the* 11*th day of January,* 1870.

COURTS OF JUSTICE (SALARIES AND FUNDS) ACT, 1869.

32 & 33 VICT. CAP. 91.

32 & 33 Vict. c. 91, s. 4-8. [This Act by sect. 4–7 provided for the transfer of stock and cash standing to the credit of the Accountant General of the Court of Chancery to the National Debt Commissioners ; these sections are repealed by the Chancery Funds Act, 35 & 36 Vict. c. 44, *post.*]

[By sect. 8 the income of the Court of Chancery is to go to the Consolidated Fund.]

CUSTODY OF INFANTS ACT.

36 & 37 VICT. CAP. 12.

An Act to amend the Law as to the Custody of Infants.
[24*th April,* 1873.]

36 & 37 Vict. c. 12. WHEREAS it is expedient further to amend the law relating to the custody of infants (*a*) :

(*a*) See 3 & 4 Vict. c. 90, which gives the Court of Chancery jurisdiction to assign the care of any infant convicted of felony to a voluntary guardian. 36 & 37 Vict. c. 12, s. 1.

Infant felon.

Be it therefore enacted, &c., as follows:—

I. From and after the passing of this Act it shall be lawful for the High Court of Chancery * in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct; and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian (*b*) of such infant or infants, and otherwise, as the said Court shall deem proper.

Order that mother may have access to and custody of infant under 16 years.

* See Judicature Act, 1873, s. 34 (2).

(*b*) As to the right of a father to the custody of his children, and his corresponding obligations, and the jurisdiction of the Court to remove the children from his care if he neglects his duties, or in consequence of his profligacy and immorality, see note to *Eyre* v. *Countess of Shaftesbury*, in 2 W. & T. Leading Cases; *Swift* v. *Swift*, 34 Beav. 266; *Re Kaye*, L. R. 1 Ch. 387; *Andrews* v. *Salt*, 8 L. R. Ch. 622; *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1.

Father's right to custody.

Speaking of the former Act, 2 & 3 Vict. c. 54 (now repealed), in *Warde* v. *Warde*, Lord Cottenham, C., said that "the object of the Act was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from receiving justice from her husband by the terror of that power which the law gave to him, of taking her children from her. That was felt to be so great a hardship of injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother. So that an application under the Act was not as was the case in *Wellesley* v. *The Duke of Beaufort* (2 Russ. 1), a question merely as to the general jurisdiction of this Court to interfere with the legal rights of the father; but that he had an absolute authority over the children under seven years of age, and a larger power than the Court then had with regard to children above that age." That Act was held to give the Court an absolute discretion against the father and testamentary guardian, *Shillito* v. *Collett*, 8 W. R. 683, 696. For cases in which the Court will not interfere under the Act, see note to sect. 4, *infra*, and the Court made the order where the children were illegitimate, *Courtois* v. *Vincent*, Jac. 268.

General objects of Act.

Under the old Act it was held that a married woman might petition *in forma pauperis* (*Ex parte Hakewell*, 3 D. M. G. 116), and that the order might be made *ex parte* if the exigencies of the case required it (*Re Taylor*, 11 Sim. 178).

Form and mode of application.

The fact that a suit for the restitution of conjugal rights was pending,

Pendency of

36 & 37 Vict. c. 12, s. 1.

which, if successful, would have the same effect as the order prayed for, was, on petition under the former Act, held sufficient to prevent the Court from interfering (*Re Taylor*, 11 Sim. 178; and see *Re Shaw*, referred to in 11 Sim. 182).

suit for restitution of conjugal rights.

Where the Court refuses to interfere under the Act.

Where a husband had filed a petition in the Divorce Court for dissolution of marriage on the ground of alleged adultery of his wife, and the judge, holding that though guilty of great misconduct, she had not committed adultery, dismissed the petition, the Court, under the old Act, in the exercise of its discretion, refused to grant her application for access to her child, who was being educated abroad, as she was living separate from her husband, who was honestly exercising his legal prerogative, *Re Winscom*, 2 H. & M. 541. And generally, if the wife has deserted her husband without justifiable cause, the Court has refused to interfere (*Re Taylor*, 11 Sim. 178). But it is not necessary that she should have obtained, or be entitled to obtain, a divorce *à mensâ et thoro* (*Ex parte Bartlett*, 2 Coll. 661. See, too, *Re Curtis*, 7 W. R. 474; 5 Jur. N. S. 1147). Where the mother, although not guilty of any moral delinquency, had contracted extravagant habits, and was without the means of contributing to the children's support, and had also married a second time, concealing that fact from the children's guardian, the Court, under the old Act, refused to make an order for the delivery of the children to her (per V.-C. Kindersley in *Shillito* v. *Collett*, 8 W. R. 683).

Education of infants.

See generally for the principles of the Court as to guardianship and religious education of infants, *Austin* v. *Austin*, 34 Beav. 257, on app. 13 W. R. 761; *Re Newbery*, L. R. 1 Eq. 431; L. R. 1 Ch. 263; *Nugent* v. *Vetzera*, 2 L. R. Eq. 704; *Re Kaye*, L. R. 1 Ch. 387.

In case of separation deed between father and mother.

II. No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto (*c*).

(*c*) This enactment was rendered necessary by such cases as *Vansittart* v. *Vansittart*, 2 De G. & J. 249, and the other cases referred to in *Hamilton* v. *Hector*, L. R. 6 Ch. 701.

Repeal of 2 & 3 Vict. c. 54.

III. The Act of the second and third Victoria, chapter fifty-four, intituled "An Act to amend the law relating to the custody of infants," shall be and is hereby repealed (*d*).

(*d*) For the cases decided under this Act, see *supra*.

MARRIED WOMEN'S PROPERTY ACT, 1870.

33 & 34 VICT. CAP. 93.

An Act to amend the Law relating to the Property of Married Women. [*9th August*, 1870.

WHEREAS it is desirable to amend the law of property and contract with respect to married women: 33 & 34 Vict c. 93. s. 1.

Be it enacted, &c., as follows:

I. The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property. Earnings of married woman to be property to her separate use.

II. Notwithstanding any provision to the contrary in the Act of the 10th year of George the Fourth, chapter twenty-four, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post office savings banks, any deposit hereafter made and any annuity granted by the said Commissioners under any of the said Acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such deposit or annuity or any part thereof to be paid to the husband. Deposits in savings banks by a married woman to be deemed her separate property. Proviso.

33 & 34 Vict. c. 93, s. 3.

A married woman's property in the funds may be made to stand to her separate use.

III. Any married woman, or any woman about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to (*a*) or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband.

(*a*) Under this section, a fund paid into Court under the Trustee Relief Act was ordered to be transferred to the account of the petitioner, a married woman, *Re Butlin*, W. N. (1876) 241.

Similar provisions as to a married woman's property in a joint stock company.

IV. Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled (*b*), may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; pro-

vided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. 33 & 34 Vict. c. 93, s. 4.

(*b*) If there is any dispute as to her title, the company is bound to investigate it, and cannot require her to establish her ownership under sect. 9, *The Queen* v. *Carnatic Railway Company*, L. R. 8 Q. B. 299.

Similar provision as to a married woman's property in a society.

V. Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

Deposit of moneys in fraud of creditors invalid.

VI. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by saving banks or moneys invested in the funds or in shares or stock of any company shall as against creditors of the husband give validity to any deposit or investment of moneys of

33 & 34 Vict. c. 93, s. 6.

the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed.

Personal property under intestacy or money not exceeding 200*l.* under deed or will coming to a married woman to her separate use.

VII. Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property (*c*) as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

(*c*) This section does not enable a married woman to transfer her equitable interest in stock standing in the Bank of England until it has been transferred into her name under s. 3, *Howard* v. *Bank of England*, L. R. 19 Eq. 295.

Freehold property coming to a married woman, rents and profits to be to her separate use.

VIII. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

How questions as to ownership of property to be settled.

IX. In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way either to the Court of Chancery in England* or Ireland according as such property is in England or Ireland, or in England (irrespective of the value of the property) the judge of the county court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry and award such costs, as he shall think fit; provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room.

* See Judicature Act, 1873, section 34 (2).

33 & 34 Vict. c. 93, s. 10.

A married woman may effect policy of insurance, and an insurance of a husband for the benefit of his wife shall be for her separate use.

X. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract on such policy shall be as valid as if made with an unmarried woman.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate (*d*). When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

(*d*) See as to the effect of this section as modifying the bankruptcy law with regard to traders' settlements, *Holt* v. *Everall*, L. R. 2 C. D. 266.

Married woman may maintain an action as to separate property.

XI. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal,

33 & 34 Vict. c. 93, s. 11.

against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels, or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman (*e*); and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

(*e*) It was held that this section did not give married women any new legal rights, *e.g.*, of contract over their separate property, but only new remedies in courts of law for the protection of it, *Howard* v. *Bank of England*, L. R. 19 Eq. 295.

Husband not to be liable on his wife's contracts before marriage.

XII. A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage (*f*), but the wife shall be liable to be sued for, and any property belonging to her for her separate use (*g*) shall be liable to satisfy, such debts as if she had continued unmarried.

Husband's liability.

(*f*) This is amended by 37 & 38 Vict. c. 50, s. 1, which enacts that a husband and wife married after 30th July, 1874, may be sued jointly and makes the husband liable, but only to the extent of assets therein specified.

(*g*) The property is liable although settled on her without power of anticipation, *Sanger* v. *Sanger*, L. R. 11 Eq. 470.

[By sect. 13, where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices may make her liable to the parish for the maintenance of her husband.]

[By sect. 14, a married woman having separate property shall be liable to the parish for the maintenance of her children.]

VENDORS AND PURCHASERS ACT, 1874.

37 & 38 VICT. CAP. 78.

An Act to extend the Law of Vendor and Purchaser, and further to simplify Title to Land. [*7th August*, 1874.

37 & 38 Vict. c. 78.

WHEREAS it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted, &c.,

[By sect. 1, in the completion of any contract of sale of land made after Dec. 31, 1874, forty years is substituted for sixty years as the root of title.] 37 & 38 Vict. c. 78. s. 1.

[By sect. 2—

First. Under a contract to grant or assign a term of years, the lessee or assign shall not be entitled to call for the title to the freehold.

Second. Recitals, &c., contained in instruments, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be sufficient evidence.

Third. The inability of the vendor to furnish a legal covenant to produce copies of documents of title shall not be an objection to title in case the purchaser will have an equitable right to the production.

Fourth. Covenants for production shall be furnished at the purchaser's expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.]

III. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act. Sales by trustees.

IV. The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust. Legal personal representative may convey legal estate of mortgaged property.

V. Upon the death of a bare trustee (*a*), *intestate as to* (*b*) any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee. Bare legal estate in fee simple to vest in executor or administrator.

(*a*) For the meaning of "bare trustee," see *Christie* v. *Ovington*, L. R. 1 C. D. 279.

(*b*) The words in italics were added by the 48th section of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), and the section as altered came into operation on 1st Jan., 1876, the 5th section of the Vendors and Purchasers Act being repealed as from that date. The 48th section of the Land Transfer Act provides that the section shall not apply to lands registered under that Act. See *Christie* v. *Ovington*, *ubi sup.* 38 & 39 Vict. c. 87.

VI. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole. Married woman who is a bare trustee may convey, &c.

[The 7th section, by which protection and priority by legal estates and

37 & 38 Vict. c. 78, s. 7.

tacking was not to be allowed, is repealed by s. 129 of the Land Transfer Act, 1875.]

Registration in Middlesex.

[By sect. 8 the non-registration of a will in Middlesex is cured if an assurance to a purchaser by the devisee or by some one deriving title under him, is registered before an assurance from the testator's heir-at-law.]

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

IX. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid (*c*).

(*c*) For examples of applications under this section, see *Christie* v. *Ovington*, L. R. 1 Ch. Div. 279; *Re Coward & Adams' Purchase*, L. R. 20 Eq. 179.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Extent of Act.

X. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

CHANCERY FUNDS ACT, 1872.

35 & 36 VICT. CAP. 44.

An Act to abolish the office of Accountant-General of the High Court of Chancery in England, and to amend the law respecting the investment of money paid into that Court, and the security and management of the moneys and effects of the suitors thereof. [6*th August* 1872.

35 & 36 Vict. c. 44.

WHEREAS it is expedient to abolish the office of the Accountant-General of the High Court of Chancery in England, and to make provision respecting the transaction of the business of the office of the said Accountant-General, and the securing on the Consolidated Fund and managing the moneys, effects, and securities of the suitors of the said Court:

As to custody and management of suitors' fund.

And whereas the commissioners acting under a commission issued by Her Majesty to inquire amongst other matters into the provisions for the custody and management of the stocks and funds of the Court of Chancery of England, and to suggest improvements therein, by their report, dated the seventeenth of February one thousand eight hundred and sixty-four, reported that it was expedient to establish a deposit account for suitors' moneys in the Court of Chancery, and to allow to the suitors interest at the rate of two per cent. per annum upon the moneys belonging to them whilst in the custody of the Court, but without depriving them of the right to require the investment thereof at any time on their own behalf and at their own risk:

As to deposit account for suitors' moneys.

And whereas it is expedient to provide for the establishment of such deposit account:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows (that is to say):

35 & 36 Vict. c. 44, s. 1.

Preliminary.

Short title.

I. This Act may be cited as "The Court of Chancery (Funds) Act, 1872."

Commencement of Act.

II. This Act shall, save as regards the making of rules and general orders as hereinafter mentioned, come into operation upon a day to be fixed by a rule to be made under this Act in that behalf (*a*), which day is hereinafter referred to as the commencement of this Act, and as to the making of any rules and general orders thereunder this Act shall come into operation on the day of the passing thereof.

(*a*) The 7th Jan., 1873, was fixed by the rules (pt. II., *post*).

Definitions.

III. In this Act—

The term "the Treasury" means the Commissioners of Her Majesty's Treasury for the time being, or any two or more of them.

The term "Court of Chancery" means the High Court of Chancery of England,* and includes the Lord Chancellor and any other judge intrusted with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind.

* See now Judicature Act, 1873, section 34 (2).

The term "order of the Court of Chancery" means such order, decree, report, certificate, or direction of the Court of Chancery as defined by this Act, or any judge or officer thereof, as may be prescribed by a rule made under this Act.

The term "General Order of the Court of Chancery" means a general order made by the Lord Chancellor, either alone or with the assistance of other judges, and either in Chancery or in Lunacy.

The term "person" includes a body corporate and company.

The term "dividends" includes interest or other periodical produce.

The term "Government securities" means any annuities, exchequer bonds, exchequer bills, and other parliamentary securities of the Government of the United Kingdom.

The term "securities" includes Government securities, and any security of any foreign state, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by any body corporate, company, or person in the United Kingdom, and all stock funds and effects. 35 & 36 Vict. c. 44, s. 3. "Securities."

The term "securities in Court" means any securities as defined by this Act standing or deposited in the name or to the credit or account of the Accountant-General of the Court of Chancery or of the Paymaster-General on behalf of the Court of Chancery, or placed to the credit of a cause, matter, or account in that Court. "Securities in Court."

The term "money in Court" means any sum of money paid into the Bank of England with the privity of the Accountant-General of the Court of Chancery or of the Paymaster-General on behalf of the Court of Chancery, or placed to the credit of any cause, matter, or account in the Court of Chancery, and includes dividends on securities in Court and interest on money on deposit. "Money in Court."

Accountant-General's Office.

IV. On the commencement of this Act the office of the Accountant-General of the Court of Chancery shall be abolished, and Her Majesty's Paymaster-General (in this Act referred to as the Paymaster-General) for the time being shall perform all the duties and exercise all the powers and authorities which before the commencement of this Act were performed by or vested in or capable of being exercised by the Accountant-General of the Court of Chancery: Provided that nothing in this Act shall render the Paymaster-General incapable of being elected to or sitting or voting in the House of Commons, or cause a member of the House of Commons upon becoming Paymaster-General to vacate his seat. Abolition of office of Accountant-General of the Court of Chancery, and performance of duties by Paymaster-General.

The Paymaster-General may do any act, sign or execute any instrument, and exercise any authority required or authorised to be done, signed, executed, or exercised by him for the purpose of this Act, or any rule made there-

35 & 36 Vict. c. 44, s. 4.

under, by a deputy or deputies appointed by him in writing under his hand.

Liability of Consolidated Fund for default of Paymaster-General.

V. The Consolidated Fund of the United Kingdom shall be liable to make good to the suitors of the Court of Chancery all money in Court and all securities in Court, whether the same have been paid, transferred, or deposited into or in Court before or after the commencement of this Act, and all money and securities vested in the Paymaster-General for the time being by or in pursuance of this Act; and if the Lord Chancellor, either with or without a representation made to him by any suitor of the Court of Chancery, certifies to the Treasury in writing that the Paymaster-General has failed to pay any money in Court, or transfer or deliver any securities in Court, required by any order of the Court of Chancery to be paid, transferred, or delivered from his account, or has been guilty of any default with respect to such money or securities, the Treasury shall cause to be paid out of the growing produce of the Consolidated Fund into the Bank of England, to the credit of the Paymaster-General for the time being on behalf of the Court of Chancery, such sum of money as may be certified by the Lord Chancellor in writing to be required to pay the money so required to be paid, or to replace the securities so required to be transferred or delivered or make good such default.

Construction of Acts, &c., referring to Accountant-General.

VI. Where under any Act (whether passed before or after the commencement of this Act), or otherwise, any money or securities would, if this Act had not passed, be capable of being paid, transferred, or deposited to or into or in the name of or to the account or credit of or with the privity of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or to or into or in the Court of Chancery, the same shall after the commencement of this Act be paid, transferred, or deposited to the credit or account of or with the privity of the Paymaster-General for the time being (*b*) on behalf of the Court of Chancery, and shall be subject to the like trusts, orders, directions, powers, and provisions as if he were the Accountant-General of the Court of Chancery or

Court of Exchequer, as the case may be, and the orders of the Court of Chancery relating thereto shall have the same effect as the like orders of the Court of Chancery or Court of Exchequer would have had if this Act had not passed. 35 & 36 Vict. c. 44, s. 6.

All Acts of Parliament, all rules and orders made in pursuance of any Act of Parliament, all general orders of the Court of Chancery, all orders of the Court of Chancery, and all instruments and proceedings of every description referring to the Accountant-General of the Court of Chancery or Court of Exchequer, shall, subject to the provisions of this Act and of any rule made thereunder, be construed and put into execution as if the Paymaster-General for the time being were therein named or referred to in place of such Accountant-General, so however that all money and securities shall be paid, transferred, or deposited to the credit or account of the Paymaster-General for the time being on behalf of the Court of Chancery, and not into the name of the person who is such Paymaster-General.

Provided that nothing in this section shall affect the Queen's Remembrancer, or the performance by him of any duties formerly performed by the Accountant-General of the Court of Exchequer, or apply to any act, rule, order, instrument, or proceeding relating to such duties.

(*b*) Even stock in a company was under this section transferred to the paymaster's account, and not to the paymaster for the time being, notwithstanding the difficulty that the company would have no name on their register, *Re Stephens*, L. R. 8 Ch. 465; but see now rule 29 of the Chancery Funds Consolidated Rules (Part II., *post*). To credit of paymaster for time being.

VII. All general orders of the Court of Chancery, and all orders of the Court of Chancery, and all instruments and proceedings relative to business of the Court of Chancery to be transacted by the Paymaster-General in pursuance of this Act (in this Act referred to as chancery business) shall, after the commencement of this Act, be framed and expressed in such manner as may be necessary for carrying the provisions of this Act with respect to the Accountant-General and Paymaster-General into effect. Framing of orders.

VIII. The Treasury shall cause the Paymaster-General to keep, in the neighbourhood of the place where the Court Office of Paymaster-General for

35 & 36 Vict. c. 44, s. 8.

of Chancery ordinarily holds its sittings, an office for the purpose of carrying on chancery business, and for making for the purpose of chancery business payments of small amount in cash, and shall from time to time provide such clerks and officers as are necessary for conducting such business and making such payments.

chancery business.

Vesting of property in Paymaster-General for time being. 12 G. 1, c. 32, s. 7; 54 G. 3, c. 14.

IX. All securities and money vested in the Paymaster-General in pursuance of this Act shall vest in the Paymaster-General for the time being on behalf of the Court of Chancery without any conveyance, assignment, or transfer, notwithstanding the death or removal from office of the person who is Paymaster-General, and shall be held by him in trust to attend the orders of the Court of Chancery, and all acts done by the Paymaster-General with reference to such securities and money in pursuance of an order of the Court of Chancery shall be valid and effectual.

Transfer of securities and receipts of dividends.

X. All securities from time to time transferred, standing, or deposited into, in, or to the account of the Paymaster-General in pursuance of this Act, shall be held by the Paymaster-General in trust in the several causes and matters in which such securities are transferred, standing, or deposited respectively, and shall not be transferred, sold, or delivered out except in pursuance of an order of the Court of Chancery, but the certificate of a registrar of the Court of Chancery or of a master or registrar in lunacy countersigned by the Paymaster-General shall be sufficient evidence of the order referred to in the certificate, and of the directions contained in such order, and shall be a necessary and sufficient authority to the governor and Company of the Bank of England and every person for transferring on sale or otherwise or delivering out any securities standing in the books of or deposited with such bank or person to the credit or account of the Paymaster-General for the time being on behalf of the Court of Chancery, and the securities directed by any such certificate to be transferred or delivered out shall be transferred or delivered out accordingly on behalf of the Paymaster-General by some officer of such bank or person.

Certificate of Registrar.

The Governor and Company of the Bank of England shall, by one of their cashiers or some other proper officer, from time to time receive all dividends accruing due on all securities which are standing to the account of the Paymaster-General for the time being on behalf of the Court of Chancery, of which a certificate has been sent to them by the Paymaster-General, and shall also receive any principal money payable in respect of any of such securities, and the said certificate shall be a sufficient authority to them to receive such dividends and principal money; and any receipt given by the said governor and company, or one of their cashiers or other proper officer, for any dividends on any securities standing to the said account, or any principal money payable in respect of any such securities, shall be a good discharge for the same; and the said governor and company shall place all money received by them in pursuance of this section to the credit of the Paymaster-General for the time being, on behalf of the Court of Chancery. 35 & 36 Vict. c. 44, s. 10.

XI. Section 19 of the Act of the session of the 16th and 17th years of the reign of her present majesty, c. 59, intituled, "An Act to repeal certain stamp duties, and to grant others in lieu thereof, to amend the laws relating to stamp duties, and to make perpetual certain stamp duties in Ireland" (which section relates to the endorsement of drafts or orders drawn upon bankers for the payment of money), shall extend to any document issued by the Paymaster-General in pursuance of this Act, which authorises the payment of money. Indorsement on cheques, &c., of Paymaster-General.

XII. The provisions of the Act of the 24th and 25th years of the reign of her present Majesty, c. 98, intituled, "An Act to consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery," which have reference to the forging or altering of any instrument made or purporting to be made by the Accountant-General of the Court of Chancery, shall apply to every instrument made, signed, or countersigned, or purporting to be made, signed, or countersigned, by the Paymaster-General, or any deputy, clerk, or officer of the Forgery of signature of Paymaster-General or his deputy. 24 & 25 Vict. c. 98, s. 33.

35 & 36 Vict. c. 44, s. 12.

Paymaster-General, and to the forgery and alteration of any signature or countersignature of such Paymaster-General, deputy, clerk, or officer.

Indemnity to Bank of England.

XIII. Nothing in this Act shall be deemed to require the Governor and Company of the Bank of England to keep the account of the Paymaster-General on behalf of the Court of Chancery causewise, and the Governor and Company of the Bank of England are hereby indemnified for all acts and things done or permitted to be done in pursuance of this Act, or of any rule purporting to be made thereunder, or of any order of the Court of Chancery made or purporting to be made in pursuance of this Act or of any such rule, or done or permitted to be done in pursuance of any certificate signed and countersigned as directed by this Act, and such acts and things respectively shall not be questioned or impeached in any court of law or equity to the detriment of such governor and company.

Establishment of suitors' deposit account.

XIV. Save as otherwise provided by any rule made under this Act, all money in court paid in either before or after the commencement of this Act shall, subject to the provisions of this Act and of any rule made thereunder, be placed on deposit, and in the case of money in court paid in after the commencement of this Act without any application or request for that purpose, and when so placed on deposit shall bear interest at the rate of 2 per cent. per annum together with any income tax chargeable thereon.

Any money which may at any time be standing to the credit of the Paymaster-General on behalf of the Court of Chancery beyond the amount which the Paymaster-General considers to be required for meeting current demands shall be placed in the hands of the Commissioners for the Reduction of the National Debt, who shall from time to time pay to the credit of the Paymaster-General on behalf of the Court of Chancery such sum as, with the money to the like credit, may be certified by him to be required to meet current demands, and the Consolidated Fund of the United Kingdom shall be liable to make good all money so placed in the hands of the Commissioners for the Reduction of the National Debt, and the

interest payable on sums placed on deposit, in like manner as it is liable to make good money in court. 35 & 36 Vict. c. 44, s. 14.

XV. Any money in court paid in either before or after the commencement of this Act which under any general order of the Court of Chancery or rule under this Act, or under an order of the Court of Chancery, is required to be laid out in any particular investment, shall, subject to any rule made under this Act, be so laid out notwithstanding anything in this Act. Saving for investments made under order of Court.

[Section 16 (empowering the court to make orders for the conversion of stock in court and the transfer of the proceeds to the suitor's deposit account) was repealed by the Judicature Act, 1875, s. 16, *post*, which directs that rules may be made as to investment of money in court in securities and conversion of Government securities into money.]

[Section 17 provides for the application of the money paid in the pursuance of this Act for the reduction of the national debt.]

Rules and Accounts.

XVIII. The Lord Chancellor, with the concurrence of the Treasury, may from time to time make rules for carrying this Act into effect, and regulating the deposit, payment, delivery, and transfer in, into, and out of the Court of Chancery* of money and securities which belong to the suitors of that Court, or are otherwise capable of being deposited in or paid or transferred into that Court, or in or into the Bank of England with the privity of the Paymaster-General, or are under the custody of the Court of Chancery,* and the evidence of such deposit, payment, delivery, or transfer, and the investment of and other dealing with money and securities in Court in pursuance of the orders of the Court of Chancery,* and the execution of the orders of the Court of Chancery* and the powers and duties of the Paymaster-General with reference to such money and securities, and in particular for doing all or any of the following things:— Treasury rules for regulating proceedings. (See 12 G. 1, c. 32, and 32 & 33 Vict. s. 91.)

*See Judicature Act, 1873, s. 34 (2).

(1.) Carrying into effect the transfer of the office of the Accountant-General to the Paymaster-General:

(2.) Regulating the mode in which the Paymaster-General is to deal with money and securities in pursuance of the orders of the Court of Chancery,* Dealing with money and securities in pursuance of

35 & 36 Vict. c. 44, s. 18.

and the mode in which effect is to be given to an order of the Court of Chancery* which is to be executed by or through the office of the Paymaster-General for Chancery business, and generally the arrangements between that office and the Court of Chancery* and the officers thereof, and the certificates and information to be given by the Paymaster-General with reference to Chancery business:

orders of court.

* See Judicature Act, 1873, s. 34 (2).

Certificates of Paymaster-General.

Payment to paymaster-General. (See 12 G. 1, c. 32, ss. 3–6.)

(3.) Regulating the deposit, payment, sale, transfer, and delivery with, to, and by the Paymaster-General of the said money and securities, and the proceedings, evidence, and duties of persons in relation thereto:

(4.) Determining the mode of ascertaining the value of Government securities transferred to the Commissioners for the Reduction of the National Debt, or otherwise ordered to be dealt with by the Paymaster-General:

Placing money on deposit.

(5.) Regulating the placing on and withdrawal from deposit of money in Court, whether paid in before or after the commencement of this Act, and the payment or crediting of interest on money placed on deposit:

(6.) Determining the smallest amount which is to be invested in securities, unless directed to be invested notwithstanding the smallness of the amount, and determining the smallest amount which is to be placed or remain on deposit, and the smallest amount of money on deposit on which interest in pursuance of this Act is to be credited to an account to which money placed on deposit belongs:

Computing interest.

(7.) Determining the time at which money in Court is to be placed on deposit, and at which interest on money so placed on deposit is to begin and cease, and the mode of computing such interest:

(8.) Determining the case in which interest on money placed on deposit, and the dividends on any securities standing to the account of the Paymaster-General on behalf of the Court of Chancery, is or are to be placed on deposit:

(9.) Dealing with accounts on which the balance of

money and securities together is less than five pounds, and providing for the periodical publication of a list of the accounts not dealt with for a period of at least fifteen years: 35 & 36 Vict. c. 44, s. 18.

(10.) Regulating the mode of framing and expressing orders of the Court of Chancery, instruments and proceedings relative to the Chancery business of the Paymaster-General:

(11.) Abrogating any general orders of the Court of Chancery relative to the matters aforesaid:

(12.) Revoking and altering any rules previously made.

Every rule purporting to be made in pursuance of this section shall come into operation at the date of such rule or any later date therein in that behalf mentioned, and have effect as if it were enacted in this Act.

Chancery rules.

XIX. The Lord Chancellor, with the advice and assistance as regards lunacy of the Lords Justices of the Court of Appeal in Chancery, or one of them, and as regards Chancery of the Master of the Rolls, the said Lords Justices, and the Vice-Chancellors, or any two of them, may from time to time make general orders for regulating the procedure and practice of the Court of Chancery for the purpose of carrying into effect this Act and any rules made thereunder, and may from time to time revoke and alter any orders previously made under this section. Every such order shall have effect as a general order of the Court of Chancery.

Every rule and general order purporting to be made in pursuance of this Act shall immediately after the making thereof be laid before both Houses of Parliament, if Parliament be then sitting, or if Parliament be not then sitting within seven days after the then next meeting of Parliament; and if either House of Parliament, by a resolution passed within one month after such rule or general order has been so laid before the said House, resolve that the whole or any part of such rule or general order ought not to continue in force, the same shall, after the date of such resolution, cease to be of any force, without prejudice nevertheless to the making of any other

35 & 36 Vict. c. 44, s. 19.

rule or general order in its place, or to anything done in pursuance of such rule or general order before the date of such resolution; but, subject as aforesaid, every such rule or general order purporting to be made in pursuance of this Act shall after the expiration of the said month be deemed to have been duly made, and to have been within the powers of this Act.

[By section 20 the Treasury are to keep accounts and have them audited.]

[Sect. 21 relates to the transfer of buildings.]

[Sects. 22—25 provides for a pension to the then Accountant-General; the status of the then existing officers of Accountant-General; the transfer of securities to Paymaster-General and alteration of accounts at Bank of England, &c.; and for dealing with certain slave compensation funds standing in the name of the Accountant-General.]

Repealing clause.

[Sect. 26 repealed wholly the Acts specified in schedule 2, part 1, and partly those specified in schedule 2, with the usual savings as to anything done or title to land or right to pension, &c., gained under those Acts.]

SCHEDULES.

SCHEDULE ONE.

[Schedule I. enumerated certain Acts relating to Slave Compensation, referred to in sect. 25.]

SCHEDULE TWO.

Part I.—Acts wholly Repealed.

12 Geo. 1, c. 32; 12 Geo. 1, c. 33; 32 Geo. 3, c. 42; 37 Geo. 3, c. 135; 52 Geo. 3, c. liv. (local); 54 Geo. 3, c. 14; 55 Geo. 3, c. lxiv. (local); 58 Geo. 3, c. lxxx. (local); 59 Geo. 3, c. xxvii. (local); 5 & 6 Will. 4, c. 45; 6 & 7 Will. 4, c. 5; 6 & 7 Will. 4, c. 82; 4 & 5 Vict. c. 18; 9 & 10 Vict. c. 81.

Part II.—Acts partly Repealed.

36 Geo. 3, c. 52, Legacy Duty Act (see pp. 65 and 66, *ante*). So much of sect. 32 as requires the Accountant-General to invest the money therein mentioned in the purchase of Three per Cent. Consolidated Bank Annuities or to give any certificate.

Part of 3 Geo. 4, c. 69, an Act relating to Fees.

Part of 3 & 4 Will. 4, c. 73, Abolition of Slavery.

Part of 5 Vict. c. 5, Administration of Justice.

10 & 11 Vict. c. 96, an Act for better securing Trust Funds and for the relief of trustees, section 3, p. 74, *ante*.

15 & 16 Vict. c. 80, sect. 59, p. 137, *ante*.

Parts of 15 & 16 Vict. c. 87, Relief of Suitors.

16 & 17 Vict. c. 98, Relief of Suitors. The whole Act, except sect. 11.

30 & 31 Vict. c. 87, The Court of Chancery (Officers) Act, 1867. Sects. 11 & 12 (see p. 123, *ante*.)

32 & 33 Vict. c. 91, The Courts of Justice (Salaries and Funds) Act, 1869, Sects. 4 to 7 (see p. 308, *ante*).

CUSTODY OF INFANTS ACT.

36 & 37 VICT., CAP. 12.

[See p. 308, *ante*.]

JUDICATURE ACT, 1873.

36 & 37 VICT., CAP. 66.

An Act for the constitution of a Supreme Court, and for other purposes relating to the better Administration of Justice in England; and to authorise the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council. [*5th August*, 1873.

36 & 37 Vict. c. 66.

WHEREAS it is expedient to constitute a Supreme Court, and to make provision for the better administration of justice in England:

And whereas it is also expedient to alter and amend the law relating to the Judicial Committee of Her Majesty's Privy Council:

Be it enacted, &c., as follows:

Preliminary.

Short title.

I. This Act may be cited for all purposes as the "Supreme Court of Judicature Act, 1873."

[Sect. 2 named 2nd Nov. 1874, for the commencement of this Act, but this was postponed to 1st Nov. 1875, by 37 & 38 Vict. c. 83 (Judicature Act, 1875) s. 2.]

PART I.

Constitution and Judges of Supreme Court.

Union of existing courts into

III. From and after the time appointed for the commencement of this Act, the several Courts hereinafter

36 & 37 Vict. c. 66, s. 3.

one Supreme Court.

mentioned (that is to say), The High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes [and the London Court of Bankruptcy,]* shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

*Repealed by the 2nd schedule to Judicature Act, 1875; see s. 9 of that Act.

High Court of Justice.

IV. The said Supreme Court shall consist of two permanent divisions, one of which, under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is hereinafter mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction (*a*) as hereinafter mentioned as may be incident to the determination of any appeal.

Court of Appeal.

(*a*) See Ord. LVIII. (pt. II., *post*).

Constitution of High Court of Justice.

* See s. 3 of the Act of 1875.

V. Her Majesty's High Court of Justice shall be constituted as follows:—The first judges thereof shall be the Lord Chancellor,* the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, and the Judge of the High Court of Admiralty, except such, if any, of the aforesaid judges as shall be appointed ordinary judges of the Court of Appeal.

Subject to the provisions hereinafter contained, whenever the office of a judge of the said High Court shall become vacant, a new judge may be appointed thereto by Her Majesty, by letters patent. All persons to be hereafter

appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively, shall continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner, respectively, as heretofore. Every judge who shall be appointed to fill the place of any other judge of the said High Court of Justice shall be styled in his appointment "Judge of Her Majesty's High Court of Justice," and shall be appointed in the same manner in which the puisne justices and junior barons of the Superior Courts of Common Law have been heretofore appointed (*b*). 36 & 37 Vict. c. 66, s. 5.

(*b*) A clause followed here reducing the number of the judges which was repealed by Judicature Act, 1875, s. 3.

All the judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction; and shall be addressed in the manner which is now customary in addressing the judges of the Superior Courts of Common Law.

The Lord Chief Justice of England for the time being shall be President of the said High Court of Justice in the absence of the Lord Chancellor.

[Sect. 6, as to the constitution of the Court of Appeal, was repealed by schedule 2 to the Judicature Act, 1875, and sect. 4 of that Act is substituted.] Court of Appeal.

[Sect. 7 related to vacancies by resignation of judges and effect of vacancies generally.]

VIII. Any barrister of not less than ten years standing shall be qualified to be appointed a judge of the said High Court of Justice; and any person who if this Act had not passed would have been qualified by law (*c*) to be appointed a Lord Justice of the Court of Appeal in Chancery, or has been a judge of the High Court of Justice of not less than one year's standing, shall be qualified to be appointed an ordinary judge of the said Court of Appeal: Provided, that no person appointed a judge of either of the said Courts shall henceforth be required to take, or to have taken, the degree of serjeant-at-law. Qualifications of judges. Not required to be Serjeants-at-Law.

36 & 37 Vict. c. 66, s. 8.

(c) Under 14 & 15 Vict. c. 83, s. 1, any barrister of fifteen years' standing may be appointed a Lord Justice of the Court of Appeal in Chancery.

[Sects. 9 and 10, as to the office and precedence of judges, were repealed by schedule 2 to Judicature Act, 1875, and were substantially re-enacted by sects. 5 and 6 of that Act.]

[Sect. 11 (extended by sect. 8 of the Act of 1875 to the judge of the Court of Admiralty) saved the rights of patronage, &c., and obligations of existing judges.]

Provisions for extraordinary duties of judges of the former courts.

XII. If, n any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any Court (*d*), whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the judges or any judge of any of such Courts, save as hereinafter mentioned, every judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a judge liable to such duty, or possessing such authority or power, before the passing of this Act. Any such duty, authority, or power, imposed or conferred by any statute, law, or custom, in any such case as aforesaid, upon the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if this Act had not passed.

Recognizances Cons. Ord. XLII. r. 13, 14.

(*d*) See Cons. Ord. XLII. rr. 13 and 14, as to giving and vacating of recognizances, which are to be given to the Master of the Rolls and the senior Vice-Chancellor, and vacated before the Master of the Rolls.

[Sects. 13 and 15 relate to the salaries and pensions of future judges. One clause of sect. 13 was repealed by 2nd schedule of Judicature Act, 1875.]

PART II.

Jurisdiction and Law.

Jurisdiction of High Court of Justice, to include juris-

XVI. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned (*e*), there shall be transferred to and vested in the said High

Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following (that is to say): 36 & 37 Vict. c. 66, s. 16.

Jurisdiction of Court of Chancery and other courts.

(1.) The High Court of Chancery, as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;

(2.) The Court of Queen's Bench;

(3.) The Court of Common Pleas at Westminster;

(4.) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court;

(5.) The High Court of Admiralty;

(6.) The Court of Probate;

(7.) The Court for Divorce and Matrimonial Causes;

[(8.) The London Court of Bankruptcy;]*

(9.) The Court of Common Peas at Lancaster;

(10.) The Court of Pleas at Durham;

(11.) The Courts created by Commissions of Assize, of Oyer and Terminer, and of Goal Delivery, or any of such Commissions:

*Repealed Judicature Act, 1875, schedule 2; see s. 9 of that Act.

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said Courts, respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such judges or judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred.

(*e*) See sects. 17 & 18, *infra*.

XVII. There shall not be transferred to or vested in the said High Court of Justice, by virtue of this Act,— Jurisdiction not transferred to High Court.

36 & 37 Vict. c. 66, s. 17.

(1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy;

(2.) Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster (*f*);

(3.) Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind (*g*);

(4.) Any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent, or the issue of commissions or other writings, to be passed under the Great Seal of the United Kingdom;

(5.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any College, or of any charitable or other foundation;

(6.) Any jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England.

Appeals from Lancaster Court.

(*f*) A single Lord Justice has no jurisdiction to hear appeals from the Court of Lancaster, *Kelshaw* v. *Vickers*, L. R. 3 Ch. 513; nor to allow pleadings filed there to be served out of the jurisdiction, *Kershaw* v. *Vickers*, 16 W. R. 772.

Jurisdiction over persons of unsound mind.

(*g*) By the 7th section of the Act of 1875 the present Lords Justices, and afterwards such judges of the Court of Appeal as may be intrusted with the care and custody of lunatics, are to have jurisdiction in lunacy.

As to the jurisdiction in respect of persons of unsound mind not found lunatics, see Ord. XVIII. and note (pt. II., *post*); and as to the appeal, see next section.

Jurisdiction transferred to Court of Appeal to include jurisdiction of Lord Chancellor and of the Court of Appeal in Chancery.

XVIII. The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following (that is to say):

(1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy;

(2.) All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the

duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster ; 36 & 37 Vict. c. 66, s. 18.

(3.) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries, assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of judge ;

(4.) All jurisdiction and powers of the Court of Exchequer Chamber ;

(5.) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

Appeals from High Court.

XIX. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned (*h*), of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act (*i*).

For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

(*h*) See section 49, *post*, p. 354.
(*i*) See Ord. LVIII., *post*.

[Sections 20 and 21 (which related to the substitution of a new tribunal for the House of Lords and the Judicial Committee) are repealed by section 24 of 39 & 40 Vict. c. 49.]

36 & 37 Vict. c. 66, s. 22.

Transfer of pending business.

XXII. From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the said High Court of Justice and the said Court of Appeal respectively shall cease to be exercised, except by the said High Court of Justice and the said Court of Appeal respectively, as provided by this Act; and no further or other appointment of any judge to any court whose jurisdiction is so transferred shall be made except as provided by this Act: Provided, that in all causes, matters, and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same judges and officers, and generally in the same manner, in all respects as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act; and every judgment, decree, rule, or order of any Court whose jurisdiction is hereby transferred to the said High Court of Justice or the said Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged by the said High Court of Justice and the said Court of Appeal respectively, in the same manner as if it had been a judgment, decree, rule, or order of the said High Court or of the said Court of Appeal; and all causes, matters, and proceedings whatsoever, whether civil or criminal, which shall be pending (*k*) in any of the Courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued and concluded, as follows (that is to say), in the case of proceedings in error or on appeal, or of proceedings before the Court of Appeal in Chancery, in and before Her Majesty's Court of Appeal; and, as to all other pro-

ceedings, in and before Her Majesty's High Court of Justice. The said Courts respectively shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the said High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be) down to the point at which the transfer takes place; and, so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued and concluded, in and before the said Courts respectively, either in the same or the like manner as they would have been continued and concluded in the respective Courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the said High Court of Justice and the said Court of Appeal respectively (so far as the same may be applicable thereto), as the said Courts respectively may think fit to direct. 36 & 37 Vict. c. 66, s. 22.

(*k*) Directions were given on November 3, 1875, which were, in effect, that causes in which, up to November 1, notice of motion for decree had not been given or replication filed, should be continued under the old practice up to the proper time for such notice or replication, and from that period under the new practice (see *Patterson* v. *Wooler*, L. R. 2 Ch. Div. 586). Directions as to pending causes. (Nov 3, 1875.)

But causes in which such notice had been given, or replication filed, were to be concluded under the old practice.

But when a *final order* had been made in any matter (*e.g.*, for taxation and payment by a solicitor), such order had to be enforced as if it had been an order of the High Court, *e.g.*, an attachment could not issue without notice, *Re a Solicitor*, L. R. 1 Ch. Div. 445. Where final order made.

For decisions as to pending business see, as to transfers, *Re Hutley*, L. R. 1 Ch. Div. 11, *Re Boyd*, *ibid.*, 12; as to appeals, *Baillam* v. *Yates*, *ibid.*, 13; as to attachment, *Garling* v. *Royds*, *ibid.*, 81; *Dallas* v. *Glyn*, 24 W. R. 881; *Provident Permanent Building Society* v. *Greenhill*, 45 L. J. Ch. Div. 272; as to evidence, *Perkins* v. *Slater*, *ibid.*, 83; *Patterson* v. *Wooler*, L. R. 2 Ch. Div. 586; as to taking a bill pro confesso, *Culley* v. *Buttifant*, *ibid.*, 84; as to stay of action, *Fletcher* v. *Wood*, W. N. (1876) 16. Decisions as to pending business.

The bill was allowed to be treated as if it were the plaintiff's statement of claim, the cause to proceed under the new practice, *Provident Permanent Building Society* v. *Greenhill*, L. R. 1 Ch. Div. 624; see *Gardiner* v. *Hardy*, W. N. (1876) 185; *Culley* v. *Buttifant*, *ubi sup.* Bill treated as statement of claim.

XXIII. The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such rules and orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such rules or orders of Court with Rules made as to procedure and practice.

36 & 37 Vict. c. 66, s. 23.

reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts.

Otherwise old practice to apply.

Law and equity to be concurrently administered.

XXIV. In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following:—

(1) Plaintiff's equity against defendant's claim founded on legal right.

(1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

(2) Defendant's equitable defence or set off.

(2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground (*l*) against any deed, instrument, or contract, or against any right, title or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Court respectively, and every judge thereof, shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act (*m*).

(3) Defendants' counter claims.

(3.) The said Courts respectively, and every judge

thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not,* who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.

36 & 37 Vict. c. 66, s. 24.

Bringing in third party.

* See note to Ord. XVI. rr. 18—21, *post*, and XXII. 5—8, as to claims against third parties.

(4.) The said Courts respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

(4) Incidental equities.

(5.) No cause or proceeding at any time pending in the High Court of Justice (*n*), or before the Court of Appeal, shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of

(5) Actions not to be stayed by injunction.

36 & 37 Vict. c. 66, s. 24.

Stay of proceedings.

defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment decree, rule, or order, contrary to which all or any part of the procedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts (*o*) respectively, by motion in a summary way, for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

(6) Legal rights to be recognized.

(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice.

(7) Multiplicity of legal proceedings to be avoided.

(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy

between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. 36 & 37 Vict. c. 66, s. 24.

(*l*) The defendant's equitable defence should be raised by counter-claim, Ord. XIX. r. 3; but where a proper case for opening signed accounts was raised by answer, the Court did not require a counter-claim to be filed, *Eyre* v. *Hughes*, L. R. 2 C. D. 148. Equitable defences.

(*m*) Where a defendant in the Common Pleas Division sets up facts which would have entitled him to have a deed cancelled in the Chancery Divisions the Common Pleas Division, though it could not reform or set aside the deed as to its future effect, treated it for the purpose of the action as if it were set aside, *Mostyn* v. *West Mostyn Company*, L. R. 1 C. P. Div. 145. See note (*v*) p. 351, *post*. This decision was followed in *Breslauer* v. *Barwick*, 24 W. R. 901.

(*n*) This section leaves untouched the Court of Bankruptcy and its power to stay actions by injunction, *Ex parte Dillon*, L. R. 1 C. D 557. Bankruptcy jurisdiction.

(*o*) The application to stay should be made to the Court where the action to be stayed is pending, *Re People's Garden Co.*, L. R. 1 Ch. Div. 44; *Needham* v. *Rivers Protection and Manure Co.*, *ibid.*, 253; *Garbutt* v. *Fawcus*, *ibid.*, 155. See too *Walker* v. *The Banagher Distillery Co.*, L. R. 1 Q. B. Div. 129, where the Queen's Bench Division, under this section and ss. 85 and 138 of the Companies' Act, 1862, stayed an action which had been brought in the Court of Queen's Bench against a company which was being wound up voluntarily. In *Kingchurch* v. *The People's Garden Co.*, L. R. 1 C. P. Div. 45, the Common Pleas Division refused an application to stay proceedings in an action pending in that division against a company where a petition to wind up the company had been presented to the Master of the Rolls, see *Re People's Garden Co.*, *ubi sup.* Application to stay proceedings.

XXV. And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned; be it enacted as follows: Rules of law upon certain points.

(1.) * In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company (*p*) under the Companies' Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities

* Clause (1) as to priorities of secured and unsecured creditors was substituted for the original clause by s. 10 of the Act of 1875.

36 & 37 Vict. c. 66, s. 25.

respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

No trusts barred by time (see 3 & 4 Will. 4, c. 27, s. 25, as to *lands*).

(2.) No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any such breach of such trust, shall be held to be barred by any Statute of Limitations.

Equitable waste.

(3.) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Merger.

(4.) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Suits for possession of land by mortgagors.

(5.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Assignment of debts and choses in action.

(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in

action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees (*q*). 36 & 37 Vict. c. 66, s. 25. Interpleader, or payment in under Trustee Relief Act.

(7.) Stipulations in contracts, as to time or otherwise, which would not before the date *of the commencement* of this Act * have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity. What stipulation of the essence of a contract. * S. 10 of Judicature Act, 1875, inserted the words in italics.

(8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order † of *the Court* (*r*) in all cases in which it shall appear to the Court to be just or convenient (*s*) that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any Injunctions and receivers. † See Ord. LII. r. 4.

36 & 37 Vict. c. 66, s. 25.

Injunction to restrain *waste* or *trespass*.

threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable (*t*).

Damages by collisions at sea.

(9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

Infants.

(10.) In questions relating to the custody and education of infants the rules of equity shall prevail.

Cases of conflict not enumerated.

(11.) Generally in all matters not herein-before particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail (*t*).

How far retrospective.

(*p*) The clause did not apply to a company whose winding-up under supervision began before the commencement of the Act, *Re Suche & Co.*, L. R. 1 C. D. 48.

Trustee Relief Act.

(*q*) See *Re Haycock's Policy*, L. R. 1 C. D. 611, and the Trustee Relief Act, p. 63, *ante*.

Injunctions.

(*r*) "The Court" means the branch of the Court where an action relating to the matter is pending, *Barr* v. *Barr*, W. N. (1876) 44.

Receiver.

(*s*) An interim receiver was appointed on an *ex parte* motion, where there was immediate danger, *Taylor* v. *Eckersley*, L. R. 2 Ch. Div. 302; and see *H.* v. *H.*, L. R. 1 C. D. 276, and notes to Ord. LII. r. 4, *post*.

Person claiming by a legal title.

Formerly the Court did not appoint a receiver at the instance of persons claiming by a title, which he might enforce by entering into possession, see *Talbot* v. *Hope Scott*, 4 K. & J. 96; *Sollory* v. *Leaver*, L. R. 9 Eq. 22; *Carrow* v. *Ferrior*, L. R. 3 Ch. 719; and see for the practice under the Act, *Habershon* v. *Gill*, W. N. (1875) 231; *Pease* v. *Fletcher*, L. R. 1 C. D. 273.

Custody of infants.

(*t*) See 36 & 37 Vict. c. 12, p. 308, *ante*, and notes.

PART III.

Sittings and Distribution of Business.

Abolition of terms, except

XXVI. The division of the legal year into terms shall be abolished so far as relates to the administration of jus-

tice; and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to rules of Court,* the High Court of Justice and the Court of Appeal, and the judges thereof respectively, or any such commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such judges or commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term.

36 & 37 Vict. c. 66, s. 26.

for certain purposes.

* See Ord. LXI., *post.*

XXVII. Her Majesty in Council may from time to time, upon any report or recommendation of the judges by whose advice Her Majesty is hereinafter authorised to make rules before the commencement of this Act, and after the commencement of this Act upon any report or recommendation of the council of judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, make, revoke, or modify, orders regulating the vacations† to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said Courts respectively; and any order in council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and rules of Court may be made for carrying the same into effect in the same manner as if such order in council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act.

Vacations.

† See Ord. LXI., *post.*

36 & 37 Vict. c. 66, s. 28.

Sittings in vacation. * Ord. LXI., rr. 5—9.

XXVIII. Provision shall be made by rules of Court for the hearing, in London or Middlesex, during vacation* by judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard.

Jurisdiction of judges, &c., to try causes or issues of fact or law on circuit.

XXIX. Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any judge or judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body of this Act; and any commissioner or commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice; and, subject to any restrictions or conditions imposed by rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the judge or judges to whom or to whose division the cause or matter is assigned, require the question or issue to be tried and determined by a commissioner or commissioners as aforesaid, or at sittings to be held in Middlesex or London as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly.

A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto.

Sittings for trial by jury in London and Middlesex.

XXX. Subject to rules of Court, sittings for the *trial by jury* of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so

far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many judges as the business to be disposed of may render necessary. Any judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by rules of Court, shall be deemed to constitute a Court of the said High Court of Justice. 36 & 37 Vict. c. 66, s. 30.

XXXI. For the more convenient despatch of business in the said High Court of Justice (but not so as to prevent any judge from sitting whenever required in any Divisional Court, or for any judge of a different division from his own) there shall be in the said High Court five divisions consisting of such number of judges respectively as hereinafter mentioned. Such five divisions shall respectively include, immediately on the commencement of this Act, the several judges following (that is to say): Divisions of the High Court of Justice.

(1.) One division shall consist of the following judges (that is to say), the Lord Chancellor, who shall be president thereof, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed ordinary judges of the Court of Appeal. Chancery Division.

[The section provides similarly for the judges of the Queen's Bench, Common Pleas, Exchequer and Probate, Divorce, and Admiralty Divisions.]

Any judge of any of the said divisions may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the said divisions.

Upon any vacancy happening among the judges of the said High Court, the judge appointed to fill such vacancy, shall, subject to the provisions of this Act, and to any rules of Court which may be made pursuant thereto, become a member of the same division to which the judge whose place has become vacant belonged.

[By section 32, Her Majesty in Council may from time to time alter divisions.] Order in Council.

XXXIII. All causes and matters which may be commenced in, or which shall be transferred by this Act to, Rules of Court to provide for

36 & 37 Vict. c. 66, s. 33.

distribution of business.

* See Ord. LI.

† See Order V. r. 4, pt. II. *post*.

the High Court of Justice, shall be distributed among the several divisions and judges of the said High Court, in such manner as may from time to time be determined by any rules of Court, or orders of transfer,* to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said divisions respectively, in the manner hereinafter provided.† Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the division, or with the name of the judge, to which or to whom the same is assigned (*u*).

Assignment of certain business to particular divisions of High Court, subject to rules.

XXXIV. There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court:

Chancery business to include matters within statutory jurisdiction.

‡ See s. 45 as to County Court appeals.

(1.) All causes and matters pending in the Court of Chancery at the commencement of this Act;

(2.) All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from County Courts;‡

(3.) All causes and matters for any of the following purposes:

Causes as to administration;

The administration of the estates of deceased persons;

partnership;

The dissolution of partnerships or the taking of partnership (*v*) or other accounts;

mortgages;

The redemption or foreclosure of mortgages;

raising charges on land;

The raising of portions, or other charges on land;

sale and distribution to pay charges;

The sale and distribution of the proceeds of property subject to any lien or charge;

trusts;

The execution of trusts, charitable or private;

rectification;

The rectification, or setting aside, or cancellation of deeds or other written instruments; (*u*)

specific performance;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases (*v*);

partition or sale;

The partition or sale of real estates;

infants' estates.

The wardship of infants and the care of infants' estates.

There shall be assigned (subject as aforesaid) to the Queen's Bench Division of the said Court: 36 & 37 Vict. c. 66, s. 34.

(1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act;

(2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction, if this Act had not passed.

[The remainder of the section similarly assigns to the Common Pleas, Exchequer and Probate Divisions (1) all matters pending in the Court of Common Pleas, &c., respectively, and (2) causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas, &c., respectively, if the Act had not passed.]

(*u*) See *Mostyn* v. *The West Mostyn Coal and Iron Company* (cited next note).

(*v*) Where a partnership action, instituted in the Common Pleas Division was considered by the Court better adapted for a reference than for a transfer to the Chancery Division, such transfer was refused, *Warner* v. *Dell*, W. N. (1875) 259; but in *Hillman* v. *Mayhew*, L. R. 1 Ex. D. 132, a cause where a counterclaim involving the right to specific performance was transferred to the Chancery Division by a judge of the Common Pleas Division, though the action was in the Exchequer Division. Where the defendant in an action in the Common Pleas Division relied on an equity to have a deed set aside or reformed as part of his defence, that division held that it could give effect to the equity so far as is incidental to the purposes of the defence, *Mostyn* v. *The West Mostyn Coal and Iron Company*, L. R. 1 C. P. D. 145. See note (*m*), p. 343. Where causes will be transferred to Chancery Division.

[Sect. 35, giving a plaintiff option to choose in what division he will sue, is repealed by 2nd schedule to Judicature Act, 1875, and substantially re-enacted by sect. 11 of that Act.] Option to choose division.

XXXVI. Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by such authority and in such manner as rules of Court* may direct, from one division or judge of the High Court of Justice to any other division or judge thereof, or may by the like authority be retained in the division in which the same was commenced, although such may not be the proper division to which the same cause or matter ought, in the first instance, to have been assigned. Power of transfer. * See Ord. LI.

XXXVII. Subject to any arrangements which may be from time to time made by mutual agreement between the judges of the said High Court, the sittings for *trials* Sittings in London and Middlesex and on Circuits.

36 & 37 Vict. c. 66, s. 37.

by jury in London and Middlesex (*w*), and the sittings of judges of the said High Court under commissions of assize, oyer and terminer, and gaol delivery, shall be held by or before judges of the Queen's Bench, Common Pleas, or Exchequer Division of the said High Court (*w*); provided that it shall be lawful for Her Majesty, if she shall think fit, to include in any such commission any ordinary judge of the Court of Appeal or any judge of the Chancery Division to be appointed after the commencement of this Act, or any serjeant-at-law, or any of Her Majesty's counsel learned in the law, who, for the purposes of such commission, shall have all the power, authority, and jurisdiction of a judge of the said High Court.

(*w*) The judges of the Probate, Divorce, and Admiralty Courts are included (sect. 8 of Judicature Act, 1875). As to the jurisdiction of judges of the Chancery Division to try questions of fact with a jury, see note (*a*), p. 244, *ante*.

[Sect. 38 relates to the rota of judges for election petitions.]

Powers of one or more judges not constituting a Divisional Court.

XXXIX. Any judge of the said High Court of Justice may, subject to any rules of Court, exercise in Court or in chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in chambers respectively, by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorised to be so heard by any rules of Court to be hereafter made. In all such cases, any judge sitting in Court shall be deemed to constitute a Court (*x*).

Power of single judge of Common Law Division.

(*x*) See now 39 & 40 Vict. c. 49, s. 17, as to single judges in Divisional Courts. See *Hillman* v. *Mayhew*, L. R. 1 Ex. D. 132, where it was held that the effect of this section and sect. 31, *supra*, and sect. 11, sub-s. 2, of the Judicature Act, 1875, taken together with Order LI., r. 2, and Order LIV., r. 2, is that any judge of the Queen's Bench, Common Pleas, or Exchequer Division, sitting at chambers, has jurisdiction to order that an action assigned to one of those divisions be transferred to the Chancery Division, though he is not a judge of the division to which the action is assigned.

[By sect. 40, such causes and matters as are not proper to be heard by a single judge were to be heard by Divisional Courts; but the practice of

hearing before single judges and Divisional Courts is altered, and this section repealed by sect. 17 of 39 & 40 Vict. c. 59, p. 388, *post.*] 36 & 37 Vict. c. 66, s. 40.

[Sect. 41 made provision for Divisional Courts for business of Queen's Bench, Common Pleas, and Exchequer Divisions. See now sect. 17 of 39 & 40 Vict. c. 59, p. 388, *post.*]

[By sect. 42, business arising out of any cause or matter assigned to the Chancery Division is to be transacted and disposed of in the first instance by one judge only, as heretofore accustomed, and every cause or matter commenced in the Chancery Division of the said High Court is to be assigned to one of the judges thereof, by marking the same* with the name of such of the said judges as the plaintiff or petitioner (subject to the power of transfer) may in his option think fit. See now sect. 17 of 39 & 40 Vict. c. 59, p. 388, *post.*] One judge to sit in Chancery Division.

* See Ord. V. r. 4.

XLIII. Divisional Courts may be held for the transaction of any part of the business assigned to the said Chancery Division, which the judge, to whom such business is assigned, with the concurrence of the president of the same division, deems proper to be heard by a Divisional Court (*y*). Divisional Courts for business of the Chancery Division.

(*y*) See this section amended, and in part repealed, by 39 & 40 Vict. c. 59, s. 17, p. 388, *post.*

[Sect. 44 contains a provision similar to that in sect. 43, as to the Probate Division.]

[By sect. 45, appeals from sessions, County Courts, and other inferior Courts are to be determined by Divisional Courts, and the determination of such appeals is to be final, unless special leave to appeal is given.] Appeals from County Courts and inferior Courts.

XLVI. Subject to any rules of Court, any judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court (*z*), may reserve any case, or any point in a case (*a*), for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued. Cases and points may be reserved for or directed to be argued before Divisional Courts.

(*z*) See this section amended and partly repealed by 39 & 40 Vict. c. 59, s. 17, p. 388, *post.*

(*a*) See section 22 of the Act of 1875, which, after reciting this section, provides "that nothing in the said Act, nor in any rule or order made under "the powers thereof or of this Act, shall take away or prejudice the right "of any party to any action to have the issues for trial by jury submitted "and left by the judge to the jury before whom the same shall come for "trial, with a proper and complete direction to the jury upon the law, and "as to the evidence applicable to such issues:

"Provided also, that the said right may be enforced either by motion in "the High Court of Justice or by motion in the Court of Appeal founded "upon an exception entered upon or annexed to the record." Right of party to have issues left to jury, Judicature Act, 1875, s. 22.

36 & 37 Vict. c. 66, s. 47.

Provision for Crown Cases reserved.

XLVII. The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either bench and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intituled "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign.

[Section 48, relating to motions for new trials, is repealed by schedule II. to Judicature Act, 1875, see Ord. XXXIX.]

What orders shall not be subject to appeal.

* See s. 50.

XLIX. No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only (*b*), which by law are left to the discretion of the Court,* shall be subject to any appeal, except by leave of the Court or judge making such order.

Orders as to costs only.

(*b*) An order declaring that the defendant had committed a breach of an injunction, but giving no directions except that the defendant should pay the costs of a motion to commit, is not within this section, and may be appealed from, *Witt* v. *Corcoran*, L. R. 2. C. D. 69.

Appeals for costs.

Under the former practice, appeals for costs alone were not generally allowed, see *Chappell* v. *Gregory*, 2 D. J. S. 111; *Collard* v. *Roe*, 4 De G. & J. 525; *Perks* v. *Wycombe Railway Company*, 1 N. R. 1; *Perks* v. *Stothert*, 11 W. R. 1016; but where a question of principle or practice is involved, such appeals are allowed, *Re Tiel*, 11 W. R. 351; *Inchbald* v. *Robinson*, L. R. 4 Ch. 396; *Hope* v. *Carnegie*, *ibid.* 265; *Cotterell* v. *Stratton*, L. R. 8 Ch. 295; *Palmer* v. *Walesby*, L. R. 3 Ch. 732; *Witt* v. *Corcoran*, L. R. 2 C. D. 69. So in cases where a person is ordered to pay costs which he contends should come out of a fund in court; but see *Taylor* v. *Dowlen*, L. R. 4 Ch. 697.

L. Every order made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion (*c*) as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in court, according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned (*d*); and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal.

36 & 37 Vict. c. 66, s. 50.

As to discharging orders made in chambers.

(*c*) See *Sheffield* v. *Sheffield*, L. R. 10 Ch. 206, and *Re McVeagh*, 1 D. J. S. 399; *Snowdon* v. *Metropolitan Railway Compy.*, *ibid.* 408. In *Cookes* v. *Cookes*, 2 D. J. S. 526, it was held that the Court of Appeal would not (except in extreme cases) disturb the selection of a receiver by a judge, unless there was some objection of principle to the person appointed, see *Ley* v. *Ley*, 27 L. T. 267; and *Re Agriculturist Cattle Insurance Company*, 3 D. F. J. 194, where the L.JJ. ordered the appointment of a person selected by the chief clerk as official manager, to be discharged, without prejudice to the judge's reappointing him, if in the exercise of his discretion he thought fit to do so.

Appeal from judge in chambers; matters of discretion.

(*d*) According to the practice of the Court of Chancery as laid down at the time of the passing of the Act, before a decision made in chambers was appealed from, the case should have been argued by counsel below, *Stroughill* v. *Gulliver*, 1 De G. & J. 113; *Hutchinson* v. *Swift*, 13 W. R. 532; but see *Snowdon* v. *Metropolitan Railway Company*, 1 D. J. S. 408; *Ridgway* v. *Newstead*, 4 De G. & J. 15.

Where counsel have been heard.

If any party had obtained the opinion of the judge on any particular point, and desired to appeal from such opinion, he ought to wait till the certificate was made and approved as a whole, and then move to vary it on account of the impropriety of the order on which it was founded, *Rhodes* v. *Rhodes*, 1 L. R. Ch. 483; see *York and North Midland Railway Company* v. *Hudson*, 18 Beav. 70, 73; *Rhodes* v. *Ibbetson*, 4 D. M. G. 787 (where, under the circumstances, the *pro formâ* application was made to the judge in chambers), and *Saunders* v. *Druce*, 3 Drew 139 (where even the *pro formâ* application appears to have been thought unnecessary); *Re Warrant Finance Company*, L. R. 5 Ch. 89; *Allen* v. *Jarvis*, L. R. 4 Ch. 616; *Murr* v. *Cooke*, 24 W. R. 756; *Re Lewis Munns & Co.*, 45 L. J. Ch. 62; but compare *Vyse* v. *Foster*, 44 L. J. Ch. 344; *Murr* v. *Cooke*, 34 L. T. N. S. 751.

Appeal from certificate.

LI. Upon the request of the Lord Chancellor, it shall be lawful for any judge of the Court of Appeal, who may consent so to do, to sit and act as a judge of the said High Court or to perform any other official or ministerial acts for or on behalf of any judge absent from illness or any other cause, or in the place of any judge whose office has become vacant, or as an additional judge of any division; and while so sitting and acting any such judge of the Court of Appeal shall have all the power and authority of a judge of the said High Court.

Provision for absence or vacancy in the office of a judge.

36 & 37 Vict. c. 66, s. 52.

Power of a single judge in Court of Appeal.

LII. In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

Divisional Courts of Court of Appeal.

[Section 53, as to the judges to sit on appeals, is repealed by 2nd schedule to Act of 1857; and section 12 of that Act is substituted.]

[Section 54, as to judges sitting on appeal from their own judgments, is repealed. See section 4 of the Act of 1875.]

[Section 55 (relating to arrangements for the business of the Court of Appeal, and for hearing appeals transferred from the Judicial Committee of the Privy Council) is repealed by 39 & 40 Vict. c. 59, s. 24, p. 391, *post*.]

PART IV.

Trial and Procedure.

Reference of questions to official referees.

Official referees and assessors.

LVI. Subject to any rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court or by any Divisional Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee,* and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such special referees or assessors shall be determined by the Court.

* See Ord. XXXVI. r. 29*a*, &c., and notes.

36 & 37 Vict. c. 66, s. 57.

Power to direct trials before referees.

LVII. In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account (*e*) arising therein to be tried either before an official referee, to be appointed as hereinafter provided,* or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of Court,† and subject thereto in such manner as the Court or judge ordering the same shall direct.

* Sect. 83, *post.*

† See Ord. XXXV. r. 29*a*, &c., and notes.

(*e*) A large construction is given to the word account, so as to include questions requiring scientific investigation. See *Re Leigh*, deceased, 24 W. R. 782.

Accounts.

Report of referee to be equivalent to verdict of jury.

Power of referees and effect of their findings.

LVIII. In all cases of any reference to or trial by referees under this Act the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by rules of Court or (subject to such rules) by the Court or judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.‡

‡ See Ord. XXXVI. r. 29*a*, and notes.

Powers of Court with respect to proceedings before referees.

LIX. With respect to all such proceedings before referees and their reports, the Court or such judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any Court whose jurisdiction is hereby transferred to the said High Court with respect

36 & 37 Vict. c. 66, s. 59.

to references to arbitration and proceedings before arbitrators and their awards respectively, by the Common Law Procedure Act, 1854 (*f*).

Common Law Procedure Act, 1854.

Power for judge to refer to arbitration.

Procedure before arbitrator, Ord. XXXVI. r. 34.

(*f*) See for the practice before referees, Ord. XXXVI. *post*. By 17 & 18 Vict. c. 125 (Chitty's Statutes, vol. I., p. 93; vol. III., p. 769), a judge may direct a reference of accounts, &c., *before trial* (s. 3), or at the trial (s. 6); but may direct any question of law to be previously decided on special case or otherwise (see Ord. XXXIV. *post*, as to special cases.)

The arbitrator may, by sect. 5 of the same Act, state a case for the opinion of the Court (see Ord. XXXVI., r. 34, where this power is specially given to the official referees).

Sect. 7 provides that the proceedings in such arbitration shall be the same as upon a reference made by consent under a rule of Court or a judge's order (see Chitty's Statutes, vol. I., p. 80—92.)

Sect. 8 gives the Court power to remit matters for reconsideration by the arbitrator. See the similar power given by Ord. XXXVI., r. 34.

Sect. 9 provides for applications to set aside, and 10 and 16 for process to enforce awards.

Sect. 11 provides for the stay of actions where parties have agreed to refer.

Sects. 12 and 13 for the appointment of an arbitrator where any difference arises upon a vacancy, and sect. 14 for an umpire.

By sect. 15, the award is to be made three months after appointment, subject to extension of time.

Her Majesty may establish district registries in the country for the Supreme Court.

LX. And whereas it is expedient to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply, and conveniently carried on therein, it shall be lawful for Her Majesty, by Order in Council, from time to time to direct that there shall be District Registrars in such places (*g*) as shall be in such order mentioned for districts to be thereby defined, from which writs of summons for the commencement of actions in the High Court of Justice may be issued, and in which such proceedings may be taken and recorded as are hereinafter mentioned; and Her Majesty may thereby appoint that any registrar of any county court, or any registrar or prothonotary or district prothonotary of any local court whose jurisdiction is hereby transferred to the said High Court of Justice, or from which an appeal is hereby given to the said Court of Appeal, or any person who, having been a District Registrar of the Court of Probate, or of the Admiralty Court, shall under this Act become and be a District Registrar of the said High Court of Justice, or who shall hereafter be appointed such district registrar, shall

and may be a district registrar of the said High Court for the purpose of issuing such writs as aforesaid, and having such proceedings taken before him as are hereinafter mentioned.* This section shall come into operation immediately upon the passing of this Act. 36 & 37 Vict. c. 66, s. 60.

* See sect. 64—66.

(*g*) This section is amended by sect. 13 of the Judicature Act, 1875, which provides that there may be joint registrars, and also that "every district "registrar shall be deemed to be an officer of the Supreme Court, and be "subject accordingly to the jurisdiction of such Court, and of the divisions "thereof."

An Order of Her Majesty in Council, dated 12th August, 1875, after reciting this section appointed certain officers to be district registrars in Liverpool, Manchester, Preston, and Durham, and provided that the registrar of the County Court should be the district registrar in the following places :—

Bangor.
Barnsley.
Barnstaple.
Bedford.
Birkenhead.
Birmingham.
Boston.
Bradford.
Bridgewater.
Brighton.
Bristol.
Bury St. Edmunds.
Cambridge.
Cardiff.
Carlisle.
Carmarthen.
Cheltenham.
Chester.
Colchester.
Derby.
Dewsbury.
Dover.
Dorchester.
Dudley.
East Stonehouse.
Exeter.
Gloucester.
Great Grimsby.
Great Yarmouth.
Halifax.
Hanley.
Hartlepool.
Hereford.
Huddersfield.
Ipswich.
Kingston-on-Hull.
Kings Lynn.
Leeds.
Leicester.
Lincoln.
Lowestoft.
Maidstone.
Newcastle-upon-Tyne.
Newport, Monmouth.
Newport, Isle of Wight.
Newtown.
Northampton.
Norwich.
Nottingham.
Oxford.
Pembroke Docks.
Peterborough.
Poole.
Portsmouth.
Ramsgate.
Rochester.
Sheffield.
Shrewsbury.
Southampton.
Stockton-on-Tees.
Sunderland.
Swansea.
Truro.
Totnes.
Wakefield.
Walsall.
Whitehaven.
Wolverhampton.
Worcester.
York.

LXI. In every such district registry such seal shall be used as the Lord Chancellor shall from time to time, either before or after the time fixed for the commencement of this Act, direct, which seal shall be impressed on every writ and other document issued out of or filed in such district registry, and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such district registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof. Seals of district registries.

36 & 37 Vict. c. 66, s. 62.

Powers of district registrars.

* See Ord. XXXV.

LXII. All such district registrars shall have power to administer oaths and perform such other duties in respect of any proceedings pending in the said High Court of Justice or in the said Court of Appeal as may be assigned to them from time to time by rules of Court,* or by any special order of the Court.

Fees to be taken by district registrars.

[Sect. 63 as to fees in district registries is repealed by 2nd sched. to Judicature Act, 1875, and see s. 26 of that Act.]

Proceedings to be taken in district registries.

* See Ord. XXXV. r. 1*a*, altering this section.

LXIV. Subject to the rules of Court* in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the district registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial,* or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment,* or an order for an account, may be taken before the district registrar, and recorded in the district registry, in such manner as may be prescribed by rules of Court; and all such other proceedings in any such action as may be prescribed by rules of Court shall be taken and if necessary may be recorded in the same district registry.

Power for Court to remove proceedings from district registries.

† See Ord. XXXV. r. 12—15.

LXV. Any party to an action in which a writ of summons shall have been issued from any such district registry shall be at liberty at any time to apply, in such manner as shall be prescribed by rules of Court,† to the said High Court, or to a judge in chambers of the division of the said High Court to which the action may be assigned, to remove the proceedings from such district registry into the proper office of the said High Court; and the Court or judge may, if it be thought fit, grant such application, and in such case the proceedings and such original documents,

if any, as may be filed therein shall upon receipt of such order be transmitted by the district registrar to the proper office of the said High Court, and the said action shall thenceforth proceed in the said High Court in the same manner as if it had been originally commenced by a writ of summons issued out of the proper office in London; or the Court or judge, if it be thought right, may thereupon direct that the proceedings may continue to be taken in such district registry. 36 & 37 Vict. c. 66, s. 65.

Accounts and inquiries may be referred to district registrars.

LXVI. It shall be lawful for the Court, or any judge of the division to which any cause or matter pending in the said High Court is assigned, if it shall be thought fit, to order that any books or documents may be produced, or any accounts taken (*h*) or inquiries made, in the office of or by any such district registrar as aforesaid; and in any such case the district registrar shall proceed to carry all such directions into effect in the manner prescribed; and in any case in which any such accounts or inquiries shall have been directed to be taken or made by any district registrar, the report in writing of such district registrar as to the result of such accounts or inquiries may be acted upon by the Court, as to the Court shall seem fit.

(*h*) It was held that except where a direction was given by the Court accounts could not be prosecuted in a district registry, *Irlam* v. *Irlam*, L. R. 2 C. D. 608, but see now Ord. XXXV. r. 1*a* (pt. II.), *post*.

Costs where sums under 20*l*. are recovered. * 30 & 31 Vict. c. 142.

LXVII. The provisions contained in the fifth, seventh, eighth, and tenth sections of the County Courts Acts, 1867* (*i*), shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court.

Where small sums are in dispute.

(*i*) These sections provide that in certain cases where small sums are in dispute the judge of a Superior Court may order a cause to be tried in a County Court, and proceedings in equity which might have been commenced in a County Court may be transferred to such Court.

Also, that if in any action commenced in a Superior Court the plaintiff shall recover a sum not exceeding 20*l*. if the action is founded in contract, or 10*l*. if founded in tort, he shall not be entitled to costs, unless the judge at chambers certifies that there was sufficient reason for proceeding in the Superior Court, or certifies for costs, *Brown* v. *Rye*, L. R. 17 Eq. 343, where it was held that these sections did not prevent a mortgagee recovering his usual costs in equity, will probably no longer apply.

Cons. Ord. IX.

By Cons. Ord. IX., r. 1, it was provided that—

36 & 37 Vict. c. 66, s. 67.

Cons. Ord. IX. r. 1.

Value of subject matter must be 10*l.*

Every suit, the subject matter of which is under the value of 10l., shall be dismissed, unless it be instituted to establish a general right, or unless there shall be some other special circumstance, which, in the opinion of the Court, shall make it reasonable that such suit should be retained.

Bill to establish rights.

See *Cox* v. *Foley*, 1 Vern. 359, where a bill for establishing a right to ancient quit rents of very small value was allowed to be filed, and the small interest of a plaintiff suing on behalf of himself and shareholders was held no objection, *Seaton* v. *Grant*, L. R. 2 Ch. 459. Where the suit is for the benefit of a charity it will be entertained though for a smaller amount than 10*l.* (*Parrot* v. *Pawlet*, Cary's Rep. 103).

Other special circumstances.

Where the sum recovered was only 9*l.*, it was held that the suit was sustainable, and the plaintiff was entitled to his costs, because the defendants had withheld information, and the plaintiff was justified in supposing that he might have recovered more (*Beckitt* v. *Bilbrough*, 8 Hare, 188). The objection may be taken advantage of by demurrer, or at the hearing (*Brace* v. *Taylor*, 2 Atk. 253).

[Sects. 68—74, providing for rules as to procedure under the Act, saving the rules as to evidence, were repealed by schedule II. to the Act of 1875, and sects. 16 and 21 of that Act are substituted.]

[By sect. 75 councils of the judges are to be held to consider procedure and administration of justice.]

Acts of Parliament relating to former Courts to be read as applying to Courts under this Act.

LXXVI. All Acts of Parliament relating to the several Courts and judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, or wherein any of such Courts or judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the judges thereof, respectively, as the case may be, had been named therein instead of such Courts or judges whose jurisdiction is so transferred respectively; and in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the judge or any judges, or of any number of the judges, of any one or more of the Courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of judges

of the said High Court of Justice; and all general and other commissions, issued under the Acts relating to the Central Criminal Court or otherwise, by virtue whereof any judges of any of the Courts whose jurisdiction is so transferred may, at the commencement of this Act, be empowered to try, hear, or determine any causes or matters, criminal or civil, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered. 36 & 37 Vict. c. 66, s. 77.

LXXVII. (amended as to the registrar of the Admiralty Court by sect. 8 of the Act of 1875) after providing that certain officers, including "the Clerks of Records and Writs, Chief and other Clerks, Commissioners to take affidavits, and other officers and assistants at the time of the commencement of this Act attached to any Court or judge whose jurisdiction is hereby transferred to the High Court or to the Court of Appeal, and also all registrars, clerks, officers and other persons at the time of the commencement of this Act engaged in the preparation of commissions or writs, or in the registration of judgments or any other ministerial duties in aid of or connected with, any Court the jurisdiction of which is hereby transferred to the said Courts respectively, shall, from and after the commencement of this Act, be attached to the Supreme Court, consisting of the said High Court of Justice and the said Court of Appeal: Provided that all the duties with respect to appeals from the Court of Chancery of the County Palatine of Lancaster which are now performed by the Clerk of the Council of the Duchy of Lancaster shall be performed by the registrars, taxing masters, and other officers by whom like duties are discharged in the Supreme Court; and the said Clerk of the Council of the Duchy of Lancaster shall not be an officer attached to the said Court," continues as follows :— Transfer of Clerks of Records and Writs and other officers.

The business to be performed in the High Court of Justice and in the Court of Appeal respectively, or in any Divisional or other Court thereof, or in the chambers of any judge thereof, other than that performed by the judges, shall be distributed among the several officers attached to the Supreme Court by this section in such manner as may be directed by rules of Court; and such officers shall perform such duties in relation to such business as may be directed by rules of Court, with this qualification, that the duties required to be performed by any officer shall be the same, or duties analogous to those which he performed previously to the passing of this Act; and, subject to such rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, in the same manner as if this Act had not passed.

All secretaries, clerks, and other officers attached to any

36 & 37 Vict. c. 66, s. 77.

existing judge who under the provisions of this Act shall become a judge of the High Court of Justice, or of the Court of Appeal, shall continue attached to such judge and shall perform the same duties as those which they have hitherto performed, or duties analogous thereto; and all such last-mentioned officers shall have the same rank and hold their offices by the same tenure, and upon the same terms and conditions, and receive the same salaries, and, if entitled to pensions, be entitled to the same pensions, as if this Act had not passed: Provided that the Lord Chancellor may, with the consent of the Treasury, increase the salary of any existing officer whose duties are increased by reason of the passing of this Act.

[By the rest of the section, upon the occurrence of a vacancy in the office of any officer coming within the provisions of this section, the Lord Chancellor, with the concurrence of the Treasury, may abolish the same, or reduce the salary, or alter the designation or duties thereof: This provision is amended by s. 34 of the Act of 1875 by which provides that the Lord Chancellor may suspend appointments to such offices.

[Sect. 78 contains provisions as to the officers of the Courts of Pleas at Lancaster and Durham.]

Chamber clerks.

[Sect. 79 amended by s. 35 of the Act of 1875, with respect to chamber clerks, contains provisions as to the personal officers of future judges.]

Provisions as to officers paid out of fees.

[By sect. 80 (amended by the Act of 1875, s. 8, as to the registrar of the Admiralty Court) officers whose emoluments are affected may be compensated.]

[By sect. 81, doubts as to the status of officers shall be determined by rules of Court.]

Powers of commissioners to administer oaths.

LXXXII. Every person who at the commencement of this Act shall be authorised to administer oaths * in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice shall be a commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal.

* See 16 & 17 Vict. c. 78, p. 202–5, *ante*, and notes.

Official referees to be appointed.

LXXXIII. There shall be attached to the Supreme Court permanent officers to be called official referees (*k*), for the trial of such questions as shall under the provisions of this Act be directed to be tried by such referees. The number and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices, shall be

determined by the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such official referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorised by any order of the said High Court, or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of moneys to be provided by Parliament. 36 & 37 Vict. c. 66, s. 83.

(*k*) Mr. James Anderson, Q.C., Mr. G. M. Dowdeswell, Q.C., Mr. C. M. Roupell, and Mr. H. W. Verey, have been appointed official referees.

Duties, appointment, and removal of officers of Supreme Court.

LXXXIV. Subject to the provisions in this Act contained with respect to existing officers of the Courts whose jurisdiction is hereby transferred to the Supreme Court, there shall be attached to the Supreme Court such officers as the Lord Chancellor with the concurrence of the presidents of the divisions of the High Court of Justice, or the major part of them, of which majority the Lord Chief Justice of England shall be one, and with the sanction of the Treasury, may from time to time determine.

Such of the said several officers respectively as may be thought necessary or proper for the performance of any special duties, with respect either to the Supreme Court generally, or with respect to the High Court of Justice or the Court of Appeal, or with respect to any one of the divisions of the said High Court, or with respect to any particular judge or judges of either of the said Courts, may by the same authority, and with the like sanction as aforesaid, be attached to the said respective Courts, divisions, and judges accordingly.

All officers assigned to perform duties with respect to the Supreme Court generally, or attached to the High Court of Justice or the Court of Appeal, and all commissioners to take oaths or affidavits in the Supreme Court, shall be appointed by the Lord Chancellor.

36 & 37 Vict. c. 66, s. 84.

All officers attached to the Chancery Division of the said High Court, who have been heretofore appointed by the Master of the Rolls, shall continue, while so attached, to be appointed by the Master of the Rolls.

All other officers attached to any division of the said High Court shall be appointed by the president of that division.

All officers attached to any judge shall be appointed by the judge to whom they are attached.

Any officer of the Supreme Court (other than such officers attached to the person of a judge as are hereinbefore declared to be removeable by him at his pleasure,) may be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

The authority of the Supreme Court over all or any of its officers may be exercised in and by the said High Court and the said Court of Appeal respectively, and also in the case of officers attached to any division of the High Court by the president of such division, with respect to any duties to be discharged by them respectively.

LXXXV. There shall be paid to every official referee and other salaried officer appointed in pursuance of this Act, such salary out of moneys to be provided by Parliament as may be determined by the Treasury with the concurrence of the Lord Chancellor.

An officer attached to the person of a judge shall not be entitled to any pension or compensation in respect of his retirement from or the abolition of his office, except so far as he may be entitled thereto independently of this Act; but every other officer to be hereafter appointed in pursuance of this part of this Act, and whose whole time shall be devoted to the duties of his office, shall be deemed to be employed in the permanent civil service of Her Majesty, and shall be entitled, as such, to a pension or compensation in the same manner, and upon the same terms and conditions, as the other permanent civil servants of Her Majesty are entitled to pension or compensation.

LXXXVI. Subject to the provisions hereinbefore contained, any rights of patronage and other rights or powers incident to any Court, or to the office of any judge of any Court whose jurisdiction is transferred to the said High Court of Justice, or to the said Court of Appeal, in respect of which rights of patronage or other rights or powers no provision is or shall be otherwise made by or under the authority of this Act, shall be exercised as follows, that is to say: if incident to the office of any existing judge shall continue to be exercised by such existing judge during his continuance in office as a judge of the said High Court or of the Court of Appeal, and after the death, resignation, or removal from office of such existing judge shall be exercised in such manner as Her Majesty may by Sign Manual direct. 36 & 37 Vict. c. 66, s. 86.

LXXXVII. From and after the commencement of this Act all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed (*l*); and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed. Solicitors and attorneys.

Any solicitors, attorneys, or proctors to whom this section applies shall be deemed to be officers of the Supreme Court; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of Her Majesty's Superior Courts of law or equity might

36 & 37 Vict. c. 66, s. 87.

previously to the passing of this Act have exercised in respect of any solicitor or attorney admitted to practise therein.

Acts relating to attorneys.

'(l) As to adapting former enactments relating to attorneys to the solicitors of the Supreme Court, see section 14 of the Judicature Act 1875.

Cons. Ord. III. Rule 1.

As to the duties of solicitors of the Court of Chancery, see Cons. Ord. III. 1, which is as follows :—

Duties of solicitors in Chancery.

1. *The solicitors of this Court in all cases where the parties sue or defend by solicitors, and the parties themselves in all cases where they sue or defend in person, shall perform all such duties as were formerly performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in relation to the several matters hereinafter mentioned, viz. :*

The making out of writs.

* See Orders IV. and IX.

The serving and being served with writs, notices, orders, warrants, and other documents, proceedings, and written communications, in causes and matters depending in Court.*

The signing of elections and agreements to proceed at law or in equity.

† See now Ord. LVIII. r. 2.

The signing of petitions of re-hearing and appeal.†

The entering of appearances and consents with the registrar.

The signing of consents to petitions.

The tender and acceptance of costs.

The joining in commission and striking of commissioners' names.

The signing of notices by paupers.

And all other duties formerly performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in suits or matters in equity.

Cons. Ord. III. Rule 11.

See also rule 11 of the same Cons. Ord. which provides as follows :—

Agreement by solicitor as to cause not to be binding unless reduced to writing.

11. *No agreement between any solicitors relating to any of their clients' causes shall be capable of being enforced, unless and until such agreement, or some note or memorial*

thereof, be put into writing, and subscribed by the party who is to be bound thereby, or his solicitor. 36 & 37 Vict. c. 66, s. 87.

A solicitor cannot be sued personally for specific performance of a compromise entered into by him as agent for his client, if the client denies the agency, *Clark* v. *Lord Rivers*, W. N. (1867) 259.

Part V

Jurisdiction of Inferior Courts.

Power by Order in Council to confer jurisdiction on inferior courts.

LXXXVIII. It shall be lawful for Her Majesty from time to time by Order in Council to confer on any inferior Court of civil jurisdiction, the same jurisdiction in equity and in admiralty, respectively, as any county court now has, or may hereafter have, and such jurisdiction, if and when conferred, shall be exercised in the manner by this Act directed.

Powers of inferior courts having equity and admiralty jurisdiction.

LXXXIX. Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

Counter-claims in inferior courts and transfers therefrom.

XC. Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim: Provided always, that in such case it shall be lawful for

36 & 37 Vict. c. 66, s. 90.

the High Court, or any division or judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any division thereof; and in such case the record in such proceeding shall be transmitted by the registrar, or other proper officer, of the inferior Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

Rules of law apply to inferior courts.

XCI. The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts.

Part VI.

Miscellaneous Provisions.

[Section 92 provides for the transfer of books and papers to Supreme Court.]

[Section 93 contains savings pending the alterations of the circuits of the judges.]

Saving as to Lord Chancellor.

XCIV. This Act, except so far as herein is expressly directed, shall not affect the office or position of Lord Chancellor; and the officers of the Lord Chancellor shall continue attached to him in the same manner as if this Act had not passed; and all duties, which any officer of the Court of Chancery may now be required to perform in aid of any duty whatsoever of the Lord Chancellor, may in like manner be required to be performed by such officer when transferred to the Supreme Court, and by his successors.

Saving as to Chancellor of Lancaster.

XCV. This Act, except so far as is herein expressly directed (*m*), shall not affect the offices, position, or functions of the Chancellor of the County Palatine of Lancaster.

(*m*) The appeal from the Chancellor is to be to the Court of Appeal, s. 18, p. 336, *ante*.

[Sections 96—98 contains savings as to the Chancellor of the Exchequer and sheriffs, the Lord Treasurer and office of the Receipt of Exchequer and provisions as to the Great Seal being in commission.]

XCIX. From and after the commencement of this Act, the Counties Palatine of Lancaster and Durham shall respectively cease to be Counties Palatine, so far as respects the issue of commissions of assize, or other like commissions, but not further or otherwise; and all such commissions may be issued for the trial of all causes and matters within such counties respectively in the same manner in all respects as in any other counties of England and Wales. 36 & 37 Vict. c. 66, s. 99. Provision as to commissions in counties palatine.

C. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following (that is to say): Interpretation of terms.

"Lord Chancellor" shall include Lord Keeper of the Great Seal.

"The High Court of Chancery" shall include the Lord Chancellor.

"The Court of Appeal in Chancery" shall include the Lord Chancellor as a judge on rehearing or appeal.

"London Court of Bankruptcy" shall include the Chief Judge in Bankruptcy.

"The Treasury" shall mean the Commissioners of Her Majesty's Treasury for the time being, or any two of them.

"Rules of Court" shall include forms.

"Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.

"Suit" shall include action.

"Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court; and shall not include a criminal proceeding by the Crown.

"Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

"Petitioner" shall include every person making any

36 & 37 Vict. c. 66, s. 100.

application to the Court, either by petition, motion, or summons, otherwise than as against any defendant.

"Defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to, attend any proceedings.

"Party" shall include every person served with notice of, or attending any proceeding, although not named on the record.

"Matter" shall include every proceeding in the Court not in a cause.

"Pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

"Judgment" shall include decree.

"Order" shall include rule.

"Oath" shall include solemn affirmation and statutory declaration.

"Crown cases reserved" shall mean such questions of law reserved in criminal trials as are mentioned in the Act of the eleventh and twelfth years of Her Majesty's reign, ch. 78.

"Pension" shall include retirement and superannuation allowance.

"Existing" shall mean existing at the time appointed for the commencement of this Act.

JUDICATURE ACT, 1875.

38 & 39 VICT. CAP. 77.

38 & 39 Vict. c. 77.

WHEREAS it is expedient to amend and extend the Supreme Court of Judicature Act, 1873:

Be it therefore enacted, &c., as follows:—

Short title, and construction with 36 & 37 Vict. c. 66.

I. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873 (in this Act referred to as the prin-

cipal Act), and together with the principal Act may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875. 38 & 39 Vict. c. 77, s 1.

II. This Act, except any provision thereof which is declared to take effect before the commencement of this Act, shall commence and come into operation on the 1st day of November, 1875. Commencement of Act.

[The remainder of the section, relating to appeals to the House of Lords, is repealed by s. 24 of 39 & 40 Vict. c. 59, *post.*]

III. Section 3 repeals part of section 5 of the Act of 1873 as to the number of the judges of the High Court of Justice and continues :

The Lord Chancellor shall not be deemed to be a permanent judge of that Court, and the provisions of the said section relating to the appointment and style of the judges of the said High Court shall not apply to the Lord Chancellor. Lord Chancellor.

IV. Her Majesty's Court of Appeal, in this Act and in the principal Act referred to as the Court of Appeal, shall be constituted as follows: There shall be five ex-officio judges thereof, and also so many ordinary judges [not exceeding three * at any one time], as Her Majesty shall from time to time appoint. Constitution of Court of Appeal.

* The words in brackets are repealed by s. 15 of 39 & 40 Vict. c. 59, *post.*

The ex-officio judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

The first ordinary judges of the said Court shall be the present Lords Justices of Appeal in Chancery, and such one other person as Her Majesty may be pleased to appoint by letters patent. Such appointment may be made either before or after the commencement of this Act, but if made before shall take effect at the commencement of the Act.

The ordinary judges of the Court of Appeal shall be styled Justices of Appeal.

The Lord Chancellor may by writing addressed to the president of any one or more of the following divisions of the High Court of Justice, that is to say, the Queen's

38 & 39 Vict. c. 77, s. 4.

Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division, request the attendance at any time, except during the times of the spring or summer circuits, of an additional judge from such division or divisions (not being ex-officio judge or judges of the Court of Appeal) at the sittings of the Court of Appeal, and a judge, to be selected by the division from which his attendance is requested, shall attend* accordingly.

* See p. 376, *post.*

Every additional judge, during the time that he attends the sittings of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a judge of the said Court of Appeal, but he shall not otherwise be deemed to be a judge of the said Court, or to have ceased to be a judge of the division of the High Court of Justice to which he belongs.

Section fifty-four of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect: No judge of the said Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself, or made by any divisional court of the High Court of which he was and is a member (*n*).

Whenever the office of an ordinary judge of the Court of Appeal becomes vacant a new judge may be appointed thereto by Her Majesty by letters patent.

(*n*) See *Fisher* v. *Val Travers Asphalte Company*, L. R. 1 C. P. Div. 259.

Sections 5, 6.

[Section 5 provides for the tenure of office of judges, and oaths of office, and that the judges are not to sit in the House of Commons; and section 6 provides for the precedence of the judges.]

Jurisdiction of Lords Justices in respect of lunatics.

† See Ord. XVIII. and notes.

VII. Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind,† shall be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be intrusted by the sign manual of Her Majesty or Her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall

be construed as if such judge or judges so intrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a judge of the Court of Appeal, and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid. 38 & 39 Vict. c. 77, s. 7.

[Section 8 related to the Judge and Registrar of the Court of Admiralty; see sections 11, 37, 77, and 80 of the Act of 1873.]

London Court of Bankruptcy not to be transferred to High Court of Justice.

IX. The London Court of Bankruptcy shall not be united or consolidated with the Supreme Court of Judicature, and the jurisdiction of that Court shall not be transferred under the principal Act to the High Court of Justice (*o*), but shall continue the same in all respects as if such transfer had not been made by the principal Act, and the principal Act shall be construed as if such union, consolidation, and transfer had not been made: Provided that—

(1.) The office of Chief Judge in Bankruptcy shall be filled by such one of the judges of the High Court of Justice appointed since the passing of the Bankruptcy Act, 1869, or, with his consent, of such one of the judges appointed prior to the passing of the last mentioned Act, as may be appointed by the Lord Chancellor to that office; and,

(2) The appeal from the London Court of Bankruptcy shall lie to the Court of Appeal in accordance with the principal Act.

(*o*) See *Ex parte Dillon*, L. R. 1 C. D. 557, cited in note (*n*) to section 24 of the Act of 1873 (p. 343, *ante*).

[Section 10 recites section 25 of the Act of 1875, and substitutes a new clause for clause (1) of that section, and enacts that in sub-section 7 of the same section the reference to the date of the passing of the principal Act shall be deemed to refer to the date of the commencement of the principal Act (see p. 343, *ante*).]

Provision as to option for any plaintiff (subject to

XI. Subject to any rules of Court and to the provisions of the principal Act and this Act and to the power of transfer, every person by whom any cause or matter may

38 & 39 Vict. c. 77, s. 11.

be commenced in the said High Court of Justice shall assign such cause or matter to one of the divisions of the said High Court as he may think fit, by marking the document by which the same is commenced with the name of such division, and giving notice thereof to the proper officer of the Court: * Provided that—

rules) to choose in what division he will sue—in substitution for 36 & 37 Vict. c. 66, s. 35.

(1.) All interlocutory and other steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any rules of Court and to the power of transfer) in the division of the said High Court to which such cause or matter is for the time being attached; and,

* See Ord. V. r. 4, and notes.

(2.) If any plaintiff or petitioner shall at any time assign his cause or matter to any division of the said High Court to which, according to the rules of Court or the provisions of the principal Act or this Act, the same ought not to be assigned, the Court, or any judge of such division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred † to the division of the said Court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner or by any other party in any such cause or matter, and all orders made therein by the Court or any judge thereof before any such transfer shall be valid and effectual to all intents and purposes in the same manner if the same respectively had been taken and made in the proper division of the said Court to which such cause or matter ought to have been assigned.

† See Ord. LI. r. 2.

[Clause (3) relates to the Probate, &c., Division only.]

Sittings of Court of Appeal.

XII. Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three judges of the

said Court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said Court sitting together. 38 & 39 Vict. c. 77, s. 12.

Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal (*p*).

Subject to the provisions contained in this section the Court of Appeal may sit in two divisions at the same time.

(*p*) All summonses finally settling the rights of parties, whether under winding-up orders or administration suits are heard by the full Court of Appeal, Memorandum, L. R. 1 Ch. Div. 41. Summons.

[Sect. 13 amends sect. 60 of the Act of 1873, as to the appointment of district registrars.
See the effect of the amendment, note (*g*), p. 359, *ante*.]

XIV. Whereas under section eighty-seven of the principal Act, solicitors and attorneys will after the commencement of that Act be called solicitors of the Supreme Court: Be it therefore enacted that: Amendment of 36 & 37 Vict. c. 66, s. 87, as to enactments relating to attorneys.

The registrar of attorneys and solicitors in England shall be called the registrar of solicitors, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron, or any two of them, may, from time to time, by regulation adapt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments, to the solicitors of the Supreme Court under section eighty-seven of the principal Act.

XV. It shall be lawful for Her Majesty from time to time, by Order in Council, to direct that the enactments relating to appeals from *county courts* shall apply to any other inferior court of record; and those enactments, subject to any exceptions, conditions, and limitations contained in the order, shall apply accordingly, as from the date mentioned in the order. Appeal from inferior court of record.

XVI. The rules of Court in the first schedule to this Act shall come into operation at the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. But such rules of Court, Rules in first schedule in substitution for 36 & 37 Vict., c. 66, s. 69, and schedule.

38 & 39 Vict. c. 77, s. 16.

and also all such other rules of Court (if any) as may be made after the passing and before the commencement of this Act under the authority of the next section, may be annulled or altered by the authority by which new rules of Court may be made after the commencement of this Act.

Provisions as to making, &c., of rules of Court before or after the commencement of the Act, in substitution for 36 & 37 Vict., c. 66, ss. 68, 69, 74, and schedule.

XVII. Her Majesty may at any time after the passing and before the commencement of this Act, by Order in Council, made upon the recommendation of the Lord Chancellor, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, or any five of them, and the other judges of the several Courts intended to be united and consolidated by the principal Act as amended by this Act, or of a majority of such other judges, make any further or additional rules of Court for carrying the principal Act and this Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the rules in the first schedule to this Act; that is to say:

(1.) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any divisional or other Courts thereof respectively, and of the judges of the said High Court sitting in chambers; and,

(2.) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and,

(3.) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein.

In substitution for 36 & 37 Vict., c. 66, s. 74.

From and after the commencement of this Act, the Supreme Court may at any time, with the concurrence of a majority of the judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter and annul any rules of Court for the

time being in force, and have and exercise the same power of making rules of Court as is by this section vested in Her Majesty in Council on the recommendation of the said judges before the commencement of this Act. 38 & 39 Vict. c. 77, s. 17.

All rules of Court made in pursuance of this section shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided.

All rules of Court made in pursuance of this section, if made before the commencement of this Act shall from and after the commencement of this Act, and if made after the commencement of this Act shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section.

The reference to certain judges in section twenty-seven of the principal Act shall be deemed to refer to the judges mentioned in this section as the judges on whose recommendation an Order in Council may be made.

Provision as to rules of Probate, Divorce, and Admiralty Courts, being rules of the High Court, —in substitution for 36 & 37 Vict, c. 66, s. 70.

XVIII. All rules and orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, except so far as they are expressly varied by the first schedule hereto or by rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act.

[The rest of the section relates only to the Probate Court and Divorce Court.]

[Sect. 19 relates only to criminal procedure.]

Provision as to Act not affecting rules of evidence or juries,—in substitution

XX. Nothing in this Act, or in the first schedule hereto, or in any rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall

38 & 39 Vict. c. 77, s. 20.

affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

for 36 & 37 Vict., c. 66, s. 72. Provision for saving of existing procedure of Courts when not inconsistent with this Act, or rules of Court,—in substitution for 36 & 37 Vict., c. 66, s. 73.

XXI. Save as by the principal Act or this Act, or by any rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act or with any rules of Court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed.

Issues to be left to jury.

[Sect. 22 amends sect. 46 of the Act of 1873 by saving the rights of parties to have issue left to the jury, and is given verbatim, note (*a*), p. 353, *ante*.]

[Sect. 23 relates to alterations in the regulation of the circuits of the judges.]

Additional power as to regulation of practice and procedure by rules of Court in respect of statutory jurisdiction.

XXIV. Where any provisions in respect of the practice or procedure of any Courts the jurisdiction of which is transferred by the principal Act or this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice and the Court of Appeal, without prejudice nevertheless to any power of the Lord Chancellor, with the concurrence of the Treasury, to make any rules with respect to the Paymaster-General, or otherwise.

Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

The Lord Chancellor, with the concurrence of the Treasury, may from time to time, by order, determine to what accounts and how intituled any such money or property as last aforesaid, whether paid, transferred, or deposited before or after the commencement of this Act, is to be carried, and modify all or any forms relating to such accounts; and the Governor and Company of the Bank of England, and all other companies, bodies corporate, and persons, shall make such entries and alterations in their books as may be directed by the Lord Chancellor, with the concurrence of the Treasury, for the purpose of carrying into effect any such order. 38 & 39 Vict. c. 77, s. 24.

XXV. Every Order in Council and rule of Court required by this Act to be laid before each House of Parliament shall be so laid within forty days next after it is made, if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament, within the next subsequent forty days on which the said House shall have sat, praying that any such rule or order may be annulled, Her Majesty may thereupon by Order in Council annul the same; and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same. Orders and rules to be laid before Parliament, and may be annulled on address from either House.

This section shall come into operation immediately on the passing of this Act.

XXVI. The Lord Chancellor, with the advice and consent of the judges of the Supreme Court or any three of them, and with the concurrence of the Treasury, may, either before or after the commencement of this Act, by order,* fix the fees and percentages (including the percentage on estates of lunatics) to be taken in the High Court of Justice or in the Court of Appeal, or in any Court created by any commission or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public moneys who is Fixing and collection of fees in High Court and Court of Appeal.

* See Order (as to Fees), Oct. 1875, pt. II., *post.*

38 & 39 Vict. c. 77, s. 26.

attached to any of those Courts or the Supreme Court, or any judge of those Courts, including the masters and other officers in lunacy, and may from time to time by order increase, reduce, or abolish all or any of such fees and percentages, and appoint new fees and percentages to be taken in the said Courts or offices or any of them, or by any such officer as aforesaid.

Any order made in pursuance of this section shall be binding on all the Courts, offices, and officers to which it refers, in the same manner as if it had been enacted by Parliament.

[The rest of the section provides for payment of all such fees and percentages into Her Majesty's Exchequer, and empowers the Treasury to make rules as to stamps.]

[Sect. 27 contains provisions as to salaries of officers of the Courts at Lancaster and Durham.]

[By sects. 28 and 29 the Treasury is to account for fees and expenditure, and the law as to payments to the senior puisne judge of the Q. B. and the Queen's Coroner is amended.]

[Sect. 30 repeals sect. 16 of the Court of Chancery Funds Act, p. 327, *ante*, and provides that rules may be made under sect. 18 of the same Act (p. 327, *ante*) with respect to the investment of monies in Court in securities, and the conversion of securities in Court into money (see pp. 402, 415, *post*).]

[Sect. 31 abolishes the office of Secretary to the Visitors of Lunatics.]

[Sect. 32 amends the Bankruptcy and Insolvency Acts of 1869 as to payment of unclaimed bankruptcy dividends.]

Repeal.

XXXIII. From and after the commencement of this Act there shall be repealed—

(1.) The Acts specified in the second schedule to this Act, to the extent in the third column of that schedule mentioned, without prejudice to anything done or suffered before the said commencement under the enactments hereby repealed; also,

(2.) Any other enactment inconsistent with this Act or the principal Act.

[Sect. 34 recites and amends the latter part of sect. 75 (p. 362, *ante*) of the Judicature Act, 1873.]

[Sect. 35 amends sect. 79 (p. 364, *ante*) of the Act of 1873 as to chamber clerks.]

FIRST SCHEDULE.

[See the rules under this Act, *post*, p. 431.]

SECOND SCHEDULE.

38 & 39 Vict. c. 77.

Session and Chapter.	Title.	Extent of Repeal.
6 Geo. 4. c. 84.	An Act to provide for the augmenting the salaries of the Master of the Rolls and the Vice-Chancellor of England, the Chief Baron of the Court of Exchequer, and the Puisne Judges and Barons of the Courts in Westminster Hall, and to enable His Majesty to grant an annuity to such Vice-Chancellor, and additional annuities to such Master of the Rolls, Chief Baron, and Puisne Judges and Barons on their resignation of their respective offices.	Section seven.
32 & 33 Vict. c. 71.	The Bankruptcy Act, 1869.	Section one hundred and sixteen from "provided that at any time," inclusive, to end of the section.
32 & 33 Vict. c. 83.	The Bankruptcy Repeal and Insolvent Court Act, 1869.	Section nineteen from "provided that at any time," inclusive, to end of the section.
36 & 37 Vict. c. 66.	Supreme Court of Judicature Act, 1873.	So much of sections three and sixteen as relates to the London Court of Bankruptcy, section six, section nine, section ten, so much of section thirteen as relates to additional judges of the Court of Appeal, section thirty-four from "all matters pending in the "London Court of Bankruptcy" to "London "Court of Bankruptcy," section thirty-five, section forty-eight, section fifty-three, section sixty-three, section sixty-eight, section sixty-nine, section seventy, section seventy-one, section seventy-two, section seventy-three, section seventy-four, and the whole of the schedule.

APPELLATE JURISDICTION ACT, 1876.

39 & 40 VICT. CAP. 59.

An Act for amending the Law in respect of the Appellate Jurisdiction of the House of Lords; and for other purposes. [11*th August*, 1876.

39 & 40 Vict. c. 59.

BE it enacted, &c., as follows:—

Preliminary.

Short title.

I. This Act may be cited for all purposes as "The Appellate Jurisdiction Act, 1876."

Commencement of Act.

II. This Act shall, except where it is otherwise expressly provided, come into operation on the first day of November, one thousand eight hundred and seventy-six, which day is hereinafter referred to as the commencement of this Act.

Appeal.

Cases in which appeal lies to House of Lords.

III. Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following (that is to say):

(1.) Of Her Majesty's Court of Appeal in England;

[(2.) Scotch Courts, and (3) Irish Courts, from which error or an appeal already lay to the House of Lords.]

Form of appeal to House of Lords.

IV. Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

Attendance of certain number of Lords of Appeal required at hearing and

V. An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this Act designated Lords of Appeal; that is to say:

(1.) The Lord Chancellor of Great Britain for the time being; and 39 & 40 Vict. c. 59, s. 5.

(2.) The Lords of Appeal in Ordinary to be appointed as in this Act mentioned; and determination of appeals.

(3.) Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices.

VI. For the purpose of aiding the House of Lords in the hearing and determination of appeals, Her Majesty may, at any time after the passing of this Act, by letters patent appoint two qualified persons to be Lords of Appeal in Ordinary,* but such appointment shall not take effect until the commencement of this Act. Appointment of Lords of Appeal in Ordinary by Her Majesty.

* See s. 14, *infrà*.

A person shall not be qualified to be appointed by Her Majesty a Lord of Appeal in Ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two years of some one or more of the offices in this Act described as high judicial offices,† or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

† See s. 25.

Every Lord of Appeal in Ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown, but he may be removed from such office on the address of both Houses of Parliament.

There shall be paid to every Lord of Appeal in Ordinary a salary of six thousand pounds a year.

Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a baron by such style as Her Majesty may be pleased to appoint, and shall during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a Lord of Parliament shall not descend to his heirs.

On any Lord of Appeal in Ordinary vacating his office,

39 & 40 Vict. c. 59, s. 6.

by death, resignation, or otherwise, Her Majesty may fill up the vacancy by the appointment of another qualified person.

A Lord of Appeal in Ordinary shall, if a privy councillor, be a member of the Judicial Committee of the Privy Council, and, subject to the due performance by a Lord of Appeal in Ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a privy councillor, to sit and act as a member of the Judicial Committee of the Privy Council.

Supplemental Provisions.

[Sect. 7 provides for pensions of Lords of Appeal in Ordinary.]

Hearing and determination of appeals during prorogation of Parliament.

VIII. For preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals, and also for the purpose of Lords of Appeal in Ordinary taking their seats and the oaths, during any prorogation of Parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of Parliament; and all orders and proceedings of the said House in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if Parliament had been then sitting, but no business other than the hearing and determination of appeals and the matters connected therewith, and Lords of Appeal in Ordinary taking their seats and the oaths as aforesaid, shall be transacted by such house during such prorogation.

Any order of the House of Lords may for the purposes of this Act be made at any time after the passing of this Act.

Hearing and determination of appeals during dissolution of Parliament.

IX. If on the occasion of a dissolution of Parliament Her Majesty is graciously pleased to think that it would be expedient, with a view to prevent delay in the administration of justice, to provide for the hearing and determination of appeals during such dissolution, it shall be lawful for Her Majesty, by writing under her Sign Manual, to authorise the Lords of Appeal in the name of

the House of Lords to hear and determine appeals during the dissolution of Parliament, and for that purpose to sit in the House of Lords at such times as may be thought expedient; and upon such authority as aforesaid being given by Her Majesty, the Lords of Appeal may, during such dissolution, hear and determine appeals and act in all matters in relation thereto in the same manner in all respects as if their sittings were a continuation of the sittings of the House of Lords, and may in the name of the House of Lords exercise the jurisdiction of the House of Lords accordingly. 39 & 40 Vict. c. 59, s. 9.

X. An appeal shall not be entertained by the House of Lords without the consent of the Attorney-General or other law officer of the Crown in any case where proceedings in error or on appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer. Saving as to fiat of Attorney-General.

XI. After the commencement of this Act error shall not lie to the House of Lords, and an appeal shall not lie from any of the courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords. Procedure under Act to supersede all other procedure.

[By sect. 12 Scotch and Irish cases, which, according to the previous practice, could not be reviewed in the House of Lords, are excluded from appeal under this Act.]

XIII. Nothing in this Act contained shall affect the jurisdiction of the House of Lords in respect of any error or appeal pending therein at the time of the commencement of this Act, and any such error or appeal may be heard and determined, and all proceedings in relation thereto may be conducted, in the same manner in all respects as if this Act had not passed. Provision as to pending business.

Amendment of Acts.

[Sect. 14 amends the constitution of the judicial committee under

39 & 40 Vict. c. 59, s. 14.

34 & 35 Vict. c. 91, and provides that on the death or resignation of the paid judges of the judicial committee of the Privy Council, Her Majesty may appoint a third and fourth Lord of Appeal in Ordinary; and also provides for the appointment of assessors in the hearing of ecclesiastical cases.]

Amendment of the Supreme Court of Judicature Acts in relation to Her Majesty's Court of Appeal.

[Sect. 15 repeals so much of the fourth section of the Judicature Act, 1875, as provides that the ordinary judges of "the Court of Appeal" should not exceed three at any one time; and provides that Her Majesty may appoint three additional ordinary judges of that Court, by transferring from the Queen's Bench, Common Pleas, and Exchequer Divisions certain judges of the said divisions, not exceeding three in number.]

Orders in relation to conduct of business in Her Majesty's Court of Appeal.

XVI. Orders for constituting and holding divisional Courts of the Court of Appeal, and for regulating the sittings of the Court of Appeal and of the divisional Courts of appeal, may be made, and when made, in like manner rescinded or altered, by the president of the Court of Appeal, with the concurrence of the ordinary judges of the Court of Appeal, or any three of them; and so much of section seventeen of "The Supreme Court of Judicature Act, 1875," as relates to the regulation of any matters subject to be regulated by orders under this section, and so much of any rules of Court as may be inconsistent with any order made under this section, shall be repealed, without prejudice nevertheless to any rules of Courts made in pursuance of the section so repealed, so long as such rules of Court remain unaffected by orders made in pursuance of this section.

Regulations as to business of High Court of Justice and divisional courts of High Court.

XVII. On and after the first day of December, one thousand eight hundred and seventy-six, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place: Provided nevertheless, that Divivisional Courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by rules of Court to be heard by a Divisional Court; and any

such Divisional Court when held shall be constituted of two judges of the Court and no more, unless the president of the division to which such Divisional Court belongs, with the concurrence of the other judges of such division, or a majority thereof, is of opinion that such Divisional Court should be constituted of a greater number of judges than two, in which case such Court may be constituted of such number of judges as the president, with such concurrence as aforesaid, may think expedient; nevertheless the decisions of a Divisional Court shall not be invalidated by reason of such Court being constituted of a greater number than two judges; and 39 & 40 Vict. c. 59, s. 17.

Rules of Court for carrying into effect the enactments contained in this section shall be made on or before the first day of December, one thousand eight hundred and seventy-six, and may be afterwards altered; and all rules of Court to be made after the passing of this Act, whether made under "The Supreme Court of Judicature Act, 1875," or this Act, shall be made by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and all such rules of Court shall be laid before each House of Parliament within such time and subject to be annulled in such manner as is provided by "The Supreme Court of Judicature Act, 1875."

There shall be repealed on and after the first day of December, one thousand eight hundred and seventy-six, so much of sections forty, forty-one, forty-two, forty-three, forty-four, and forty-six of "The Supreme Court of Judicature Act, 1873," as is inconsistent with the provisions of this section.

XVIII. Whenever any two of the said paid judges of the Judicial Committee of the Privy Council have died or Power in certain events to fill

39 & 40 Vict. c. 59, s. 18.

resigned, Her Majesty may, upon an address from both Houses of Parliament, representing that the state of business in the High Court of Justice is such as to require the appointment of an additional judge, fill up one of the vacancies created by the transfer hereinbefore authorised, by appointing one new judge of the said High Court in any division thereof; and on the death or retirement of the remaining two paid judges of the said Judicial Committee, Her Majesty may, upon the like address, fill up in like manner another of the said vacancies, and from time to time fill up any vacancies occurring in the offices of judges so appointed.

vacancies occasioned in High Court of Justice by removal of judges to Court of Appeal.

Attendance of judges of High Court of Justice on Court of of Appeal.

XIX. Where a judge of the High Court of Justice has been requested to attend as an additional judge at the sittings of the Court of Appeal under section four of "The Supreme Court of Judicature Act, 1873," such judge shall, although the period has expired during which his attendance was requested, attend the sittings of the Court of Appeal for the purpose of giving judgment or otherwise in relation to any case which may have been heard by the Court of Appeal during his attendance on the Court of Appeal.

Amendment of Judicature Acts as to appeals from High Court of Justice in certain cases.

XX. Where by Act of Parliament it is provided that the decision of any Court or judge the jurisdiction of which Court or judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof, to Her Majesty's Court of Appeal.

[Sect. 21 continues until 1 Jan., 1878, in lieu of 1 Jan., 1877, s. 34 of 38 & 39 Vict. c. 77, as to vacancies in legal offices.]

Appointment of deputy by district registrars.

XXII. A district registrar of the Supreme Court of Judicature may from time to time, but in each case with the approval of the Lord Chancellor and subject to such regulations as the Lord Chancellor may from time to time make, appoint a deputy, and all acts authorised or required to be done by, to, or before a district registrar may be done by, to, or before any deputy so appointed: Provided always, that in no case such appointment shall be made for a period

exceeding three months. This section shall come into force at the time of the passing of this Act. 39 & 40 Vict. c. 59, s. 23.

[Sect. 23 appoints a vice-admiral, judge, and officers of the Vice-Admiralty Court.]

Repeal and Definitions.

[Sect. 24 repeals sect. 16 of the Church Discipline Act (3 & 4 Vict. c. 86), and sects. 20, 21, and 55 of the Judicature Act, 1873, and sect. 2 of the Judicature Act, 1875 (with the exception of so much of sect. 2 as declares the day on which that Act is to commence).] Repeal of certain sections.

XXV. In this Act, if not inconsistent with the context, the following expressions have the meaning hereinafter respectively assigned to them; that is to say, Definitions:

"High judicial office" means any of the following offices; that is to say, "High judicial office;"

The office of Lord Chancellor of Great Britain or Ireland, or of paid judge of the Judicial Committee of the Privy Council, or of judge of one of Her Majesty's superior courts of Great Britain and Ireland:

"Superior Courts of Great Britain and Ireland" means and includes,— "superior courts;"

As to England, Her Majesty's High Court of Justice and Her Majesty's Court of Appeal, and the superior courts of law and equity in England as they existed before the constitution of Her Majesty's High Court of Justice; and

As to Ireland, the superior courts of law and equity at Dublin; and

As to Scotland, the Court of Session.

"Error" includes a writ of error or any proceedings in or by way of error. "error."

Note as to the Consolidated and General Orders previous to December, 1874.

The consolidated and general orders issued previously to December, 1874, and which are not abrogated or superseded, will be found in the notes, generally printed in large italics.

For references to the above orders, see the general Index, under the head "Consolidated and General Orders."

PART THE SECOND.

RULES AND ORDERS

UNDER THE

COURT OF CHANCERY FUNDS ACT, 1872,

AND THE

SUPREME COURT OF JUDICATURE ACT, 1875.

RULES UNDER THE COURT OF CHANCERY (FUNDS) ACT, 1872.

35 & 36 VICT. CAP. 44.

Issued 22nd day of December, 1874.

I.—OPERATION AND CONSTRUCTION OF RULES.—DEFINITIONS.—REVOCATION OF FORMER RULES AND GENERAL ORDERS.

Rules, 1874. Definitions, &c.

[Rule 1 provided that the Chancery Funds Rules, 1872, should be revoked, and these should come into operation on January 11, 1875, and should be cited as the "Chancery Funds Consolidated Rules, 1874."]

Revocation of Chancery Funds Rules, 1872, and substitution and commencement of these rules.

[By rule 2 "in these rules, and in orders, and in directions and certificates "issued by the Chancery Paymaster, terms shall have the same meaning as "in the Chancery Funds Act," and the following terms are defined :—

Interpretation of terms.

"Court" shall mean the Court of Chancery.

Court.

"Order" shall mean an order of the Court of Chancery, intituled in a cause or matter in the said Court, and made by any judge or judges thereof whether sitting in Court or at chambers, or an order of the Court intituled in the matter of the suitors of the Court; or

Order.

Rules, 1874. Definitions, &c.

as to payments out of the "Appeal Deposit Account" an order made on a non-attendable petition presented to the Lord Chancellor; and the term "order" shall include a decree, and a report of a Master in Lunacy confirmed by fiat, and thereby receiving the operation of an order under the Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70.

Chief Clerk. "Chief Clerk" shall mean the chief clerk of a judge of the said Court.

Chief Clerk's certificate "Chief Clerk's certificate" and "Certificate of a Chief Clerk" shall mean a certificate intituled in a cause or matter in the said Court, and made by a chief clerk of a judge of the said Court, and approved and signed by a judge thereof.

Bank. "Bank" shall mean Bank of England or Governor and Company of the Bank of England.

"National Debt Commissioners" shall mean the Commissioners for the Reduction of the National Debt.

Chancery Paymaster, &c. "Chancery Paymaster" shall mean Her Majesty's Paymaster-General for the time being, or the Assistant Paymaster-General for chancery business for the time being deputed by the Paymaster-General to act on his behalf for chancery business; and "Chancery Pay Office" shall mean Paymaster-General's office for chancery business; and "Chancery Pay Office Account" shall mean the account at the bank of the Paymaster-General for the time being on behalf of the Court of Chancery; and "Chancery Audit Office" shall mean the chancery branch of the department of the Comptroller and Auditor-General.

Words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number, and words importing males shall include females.

Title of cause. "Title of the cause" shall, with respect to causes commenced since 1st November, 1852, mean the short title of the cause with the reference to the record;* and "cause or matter" shall include a separate

* Cons. Ord. I. r. 48, in note to Ord. V. r. 4, *post*.

account in a cause or matter, and a matter intituled merely as an account. Rules, 1874. Definitions, &c.

[Rule 3 abrogates Cons. Ord. I. rr. 1—16; V. r. 5; XXIII., rr. 3—9; XLI. rr. 1—9; and the orders of 10th January, 1870, as to legacy and succession duty, the 25th February, 1868, 17th January, 1870, 1st May, 1871, and 28th August, 1828; and the 29th, 49th, 50th, and 51st of the General Orders in Lunacy of 7th November, 1853.] Abrogation of certain General Orders in Chancery and in Lunacy.

[By rule 4 "every rule or part of a rule hereinafter contained which is a "repetition without variation of a rule, or general order, or part of a rule or "general order, hereby revoked or abrogated, shall receive the same con- "struction as was put on such revoked or abrogated rule or order, or part "of a rule or of an order, and shall operate, not as a new rule, but in the "same manner as such revoked or abrogated rule or order, or part of a rule "or of an order, would have operated if this consolidation had not been "affected; and by rule 5 every rule or part of a rule hereinafter contained "which is a repetition with variation of a rule, or general order, or part of a "rule or general order, hereby revoked or abrogated, shall receive the same "construction as was put on such revoked or abrogated rule or order, or part "of a rule or of an order, and shall operate, not as a new rule, but in the "same manner as such revoked or abrogated rule or order, or part of a rule "or of an order, would have operated if this consolidation had not been "effected, except so far as such variation indicates a contrary intention. "And where the variation is of such a character as to be reasonably attri- "butable, not to a variation of intention, but simply to a design to harmonise "the style or language of the several rules and general orders hereinafter "incorporated, such variation shall not be deemed to indicate any such con- "trary intention."] Construction of Rules repeating former Rules, or General Orders (from Prel. Cons. Ord. r. 7 & 8).

[By rule 6 "orders made before the commencement of the Chancery Funds "Rules, 1872, containing directions not then carried into effect, for the pay- "ment of money or securities into Court *in trust* in a cause or matter, shall "be read and construed as if they directed such money or securities "respectively to be paid or transferred into, or deposited in Court to the "credit of the same cause or matter, and no declaration of trust shall be "required to be made with respect to any of such securities."] Construction of existing orders.

II.—Framing and Printing Orders, and Particulars to be stated.—Duplicates and Office Copies.

Rules, 1874. Form of Orders as to funds in Court.

7. Every order directing money or securities in Court to be dealt with shall, except in the case of orders made in the matter of the suitors of the Court, be intituled in the cause or matter (but not in any separate account therein), to the credit of which such money or securities shall be placed in the books at the Chancery Pay Office; and every such order shall state, in the body of such order and not merely by reference to the title of it, the exact title of the cause or matter and separate account, if any, to the credit of which the money or securities dealt with shall be standing; and every order directing money or

Mode of intituling orders "in a cause or matter."

Titles of accounts to be stated in body of order.

Rules, 1874. Form of orders as to funds in Court.

securities to be brought into Court shall state in the body of such order the title of the cause or matter, and the separate account, if any, to the credit of which such money or securities are to be placed.

Exact amount of funds dealt with, or sources whence derived, to be stated. See Cons. Ord. XXIII. r. 3.

8. Every order directing money or securities in Court to be dealt with shall express the exact amount of money or securities to be dealt with, whenever it can be ascertained, and the amount of money or securities standing in the books at the Chancery Pay Office, at the date of such order, to the credit of the cause or matter to which the money or securities to be dealt with may be placed, and not merely by reference to another order (except where the name of one person is ordered to be substituted for the name of another person to whom a payment, transfer, or delivery of money or securities, has been directed by a former order); and if the money or securities, or the dividends on securities, to be so dealt with under any such order, shall not be in Court at the date thereof, the source from which such money, securities, or dividends will be derived shall be stated.

Except where amount cannot be ascertained at date of order (see *Byron* v. *Garraway*, 9 Sim. 260).

And in every case the exact amount of money or securities in Court to be dealt with by the Chancery Paymaster shall be expressed in an order, or in a chief clerk's certificate, or in a certificate of a taxing master, or in a certificate of a master in lunacy; unless such money be payable for legacy or succession duty, or be described as dividends to accrue on securities in Court, or to be brought into Court, or as interest to be credited in respect of money on deposit, or as money to arise by the realization of securities, or as the residue of such dividends, interest, money, or securities respectively, after deducting an amount expressed in an order or in such a certificate, or an amount of securities directed to be realized unascertained at the date of the order directing the realization thereof, or as an aliquot or proportionate part of such dividends, interest, money, securities, or residue, respectively; and in the case of residues, and aliquot or proportionate parts, of money, securities, dividends, or interest, the amount of which cannot be ascer-

tained at the date of the order, the amounts may be ascertained in manner provided by rules 10 and 86.

Rules, 1874. Form of orders as to funds in Court.

Money, dividends, or interest directed by an order to be paid into Court, the amount of which cannot be ascertained at the date of the order, may be ascertained in like manner.

9. Directions in orders to be acted upon by the Chancery Paymaster shall, so far as practicable, be expressed in or by reference to a schedule or tabular statement subjoined to the order; and where the actual amounts to be dealt with cannot be ascertained at the date of the order, the aliquot or proportionate parts to be dealt with may be stated in such schedule or tabular statement in words at length; but the total amount of the securities or money (or where the order does not dispose of the whole then the number of the aliquot or proportionate parts) dealt with in any such schedule shall be stated in words at length * in the mandatory part of the order.

Directions when practicable, to be expressed in or by reference to a schedule or tabular statement. See Cons. Ord. XXIII. r. 7.

* See r. 8, *supra*.

10. When interest is payable in respect of any money in Court directed by an order to be dealt with by the Chancery Paymaster the order shall state the rate per centum at which, and (if the day to which interest is payable can be fixed by the order), the day inclusive to which, such interest is computed, and the amount of such interest.

Amount of interest payable to be stated if practicable, and if not stated, how the amount is to be ascertained.

If the day to which interest is to be computed cannot be fixed by the order, the day from which (exclusive) such interest is to be computed shall (except in the case of a computation of subsequent interest from the foot of the certificate of a chief clerk, or a master in lunacy), be stated in the order, and such interest may be directed to be computed and certified * by a chief clerk, or a master in lunacy, or (where the computation is dependent upon the taxation of costs) by a taxing master.

* See Cons. Ord. XXXV. r. 45, p. 151, *ante*.

When interest is certified by a chief clerk, or a master in lunacy, or a taxing master, such interest may, unless the order otherwise directs, be computed to a day subsequent to the date of the certificate and to be named therein as the day for payment, so as to allow a reasonable

Rules, 1874. Form of orders as to funds in Court.

time for doing all necessary acts to enable the payment to be made; and the chief clerk, or master in lunacy, or taxing master, may, if he thinks fit, require a statement in writing of such computation, authenticated by the signature of the solicitor of the person having the carriage of the order, to be produced before preparing the certificate, but no affidavit verifying such computation shall be required.

When the day for payment cannot be fixed by the order, and the interest is not directed to be certified in manner aforesaid, the order may direct the interest to the day for payment to be ascertained by an affidavit, or by a statutory declaration under the 5th and 6th William 4th, cap. 62, in which case such interest shall be computed to a day (inclusive) to be named in such affidavit or declaration, as the day for payment, and which day shall not be more than ten days after the day of swearing such affidavit, or making such declaration; and such affidavit or declaration shall be a sufficient authority to the Chancery Paymaster to pay or apply the amount of interest so ascertained in the manner directed by such order.

And in every case in which interest is to be computed, income tax (if any) shall, in making such computation, be deducted therefrom at the rate payable during the time such interest accrues, unless the order otherwise directs; and it shall be stated in every such affidavit or declaration as aforesaid that income tax, if any, has been deducted.

Documents on which any dealings by the Chancery Paymaster are made contingent to be described.

11. Whenever the dealing by the Chancery Paymaster with money or securities in Court, is, by an order, made contingent upon the execution of some document, the document shall be described (*a*), and the parties thereto by whom it is to be executed shall be named in an order or in a certificate of a master in lunacy, or of a chief clerk. The execution of such document shall be certified by a master in lunacy, or by a chief clerk, or may be verified by affidavit, if the order by which such execution is required shall so direct.

(*a*) See *Re Clough*, 32 L. T. N. S. 195.

Rules, 1874 Form of orders as to funds in Court.

12. Persons who are directed by an order to pay or transfer into, or deposit in Court any money or securities, and persons to whom money or securities are directed to be paid, transferred, or delivered, and persons for or during whose lives or other less period, payments are directed to be made, shall be described in the order, or in a certificate of a chief clerk, or a master in lunacy, or a taxing master, by name, and not merely as plaintiffs or petitioners, or the like; unless such payments, transfers, or deliveries are to be made to trustees or other persons in succession, or to representatives when no probate or letters of administration shall have been taken out at the date of such order or certificate. Bodies corporate, companies, or societies shall be described by their proper titles or designations, and the Christian names and surnames, or titles of honour, of all other such persons shall be expressed in words at length and without abbreviations in such orders or certificates, the Christian names preceding the surnames.

Persons by or to whom payments and transfers are to be made to be named (Cons. Ord. XXIII. r. 5, amended).

Time for making periodical payments to be stated (Cons. Ord. XXIII. r. 6, amended).

13. Every order directing the payment of dividends, annuities, or other periodical payments to be made by the Chancery Paymaster shall (except in the case of dividends directed to be paid as they accrue due) specify the time when the first of such payments, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, shall be made.

Orders dealing with funds to provide for *legacy or succession duty*, or indicate their liability (Cons. Ord. XXIII. r. 9, amended).

14. Every order directing the payment of money, or the transfer or delivery of securities in Court, in respect of which duty shall be payable to the revenue under the Acts relating to legacy or succession duty, shall, unless such order expressly provides for the payment of the duty, also direct the Chancery Paymaster to have regard to the circumstance that such duty is payable; and when by an order money or securities, in respect of which such duty may be chargeable, are directed to be invested, carried over, or placed to a separate account, the words "subject to legacy duty" or "subject to succession duty," as the case may be, shall be added in the order to the title of the account thereby directed to be raised. Every order pro-

Rules, 1874. Form of orders as to funds in Court.

viding for payment, out of money or the proceeds of securities in Court, of any duty payable under the Acts relating to legacy or succession duty shall direct that the amount of such duty shall, upon the requisition of the Commissioners of Inland Revenue,* be transferred to the account of the Receiver General of Inland Revenue at the Bank.

* See r. 57, *post.*

Orders to be acted on by Chancery Paymaster to be printed.

15. Every order made after the commencement of these rules, which is to be acted upon by the Chancery Paymaster (except reports of the masters in lunacy, confirmed by fiat, and orders drawn up by the registrar in lunacy), shall be drawn up by and entered with the registrars of the Court; and every order to be acted upon by the Chancery Paymaster (except the said reports), shall either be wholly printed, or in cases in which printed forms can be used, may be partly printed and partly written; provided that the registrars may issue any such orders in writing, if of an urgent nature.

The printing of orders shall be under the control of the registrars, and the orders shall be printed on cream wove, machine made, foolscap folio paper, 18 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a half wide, except as to the schedule or tabular statement in any such order contained or referred to, which may be printed in such smaller type as the registrars shall direct.

Sums occurring in the body of every such order shall be expressed in words; dates occurring therein, and any sums in such schedule or tabular statement as mentioned in rule 9, shall be expressed in figures instead of words; and each separate direction in such orders shall (as far as may be) be contained in a distinct paragraph; and in all other respects such orders shall be printed in such form and manner as the registrars shall deem expedient.

Amendment of accidental errors in printed orders.

16. Clerical mistakes or errors arising from any accidental slip or omission in such printed orders may be amended in writing (but no amendment, shall be made in any order, to provide for a new state of circumstances

arising after the date of the order; nor shall any order be amended for the purpose of extending the time thereby limited for making any payment, or transfer into, or deposit in Court of money or securities); and every such amendment shall be stamped by the clerks of entries, or by the Record and Writ Clerks, with their official seal, as evidence that the duplicate or record has been also amended.

Rules, 1874. Office copies of orders as to funds in Court.

17. The registrars of the court shall be provided with official stamps or seals for the authentication of orders and other documents, and of amendments therein.

Registrar's official stamp for authenticating documents.

18. The registrars shall cause a duplicate of every printed or partly printed order to be made at the same time with the original; and the original order shall be passed by a registrar in the usual way, and stamped with his official seal on every leaf thereof, and be transmitted by him to the clerks of entries with the duplicate.

A duplicate to be made of printed orders,

The duplicate order shall be retained and filed by the clerks of entries as the record, and the original order when examined and stamped by them, and marked with a reference thereon to the duplicate or record so filed, shall be returned to the registrar to be delivered out to the solicitor of the party having the carriage of the order.

and filed by the clerks of entries.

19. The registrars may cause to be printed additional copies of printed orders, or printed portions of orders, according to the requirements of the parties or their solicitors, and such additional copies shall be transmitted to the Report Office; and when such printed or partly printed orders have been passed and entered, such additional copies upon being duly completed and signed or certified by one of the Clerks of Records and Writs, and authenticated in the same manner as written office copies of orders, or copies certified pursuant to the Act of the 14th and 15th Vict. c. 99, s. 14,* are now signed or certified and authenticated, may be issued as office or certified copies.

Additional and office copies of printed orders

* Evidence Act, 1851.

20. Rules 15 and 16 shall, so far as applicable, extend to and include orders in lunacy to be acted upon by the Chancery Paymaster, drawn up by the Registrar in Lunacy, but the printing thereof shall be exclusively under the

Rules as to printing to apply to orders in lunacy.

Rules, 1874. Office copies of orders as to funds in Court.

direction and control of the registrar in lunacy; and such orders shall be entered by him in the manner prescribed by section 100 of the Lunacy Regulation Act, 1853 (16th and 17th Vict. c. 70).

Rules, 1874. Copies of Orders as to Funds in Court.

III.—Copies of Orders, and other Documents to be sent to Chancery Audit Office.

[Rules 21—24 relate to the transmission of certificates, and documents, and office copies of orders to be acted upon by the Chancery Paymaster by the Clerks of Records and Writs to the Chancery Audit Office.]

Rules, 1874. Bringing Funds into Court.

IV.—Bringing Funds into Court.

Bringing funds into Court on request.

25. Money and securities may be paid or transferred into, or deposited in, Court, and be placed in the books at the Chancery Pay Office to the credit of a cause or matter, on a direction to be obtained from the Chancery Paymaster, upon the written request of the person desirous of so paying, transferring, or depositing, or of his solicitor, without an order,* but no such payment, transfer, or deposit shall be so made to a separate account in a cause (except to a security for costs account), unless such separate account has been directed to be opened by an order, and such request shall be filed in the Report Office. This rule shall not apply to money, or securities, directed by an order to be paid or transferred into, or deposited in, Court, nor shall it apply to money or securities payable or transferable into Court, in pursuance of an Act of Parliament, or a general order of the Court, by which some particular authority is required to enable the payment, transfer, or deposit to be made.

* For the notices to be given in such a case, see the fourth of the Amended Orders, p. 428, *post*.

Request to contain reference to record.

26. Every request for a direction for payment or transfer into, or deposit in, Court of money or securities to be placed to the credit of a cause commenced since 1st November, 1852, shall contain the title of the cause and the reference to the record as cited in rule 2, and the correctness of such reference shall be authenticated by the official seal of the Clerks of Records and Writs being impressed on such request.

Rules, 1874. Bringing funds into Court.

27. A person directed by any order to make a payment or transfer into, or deposit in, Court shall be at liberty to make the same without further order, notwithstanding the order may not have been served, or the time thereby limited for making such payment, transfer, or deposit may have expired,* and if any further sum of money has by reason of such default become payable by such person for interest, or in respect of dividends, he shall be at liberty to pay into Court such further sum upon a request as provided by rule 25; provided that any such subsequent payment, transfer, or deposit shall not affect or prejudice any liability, process, or other consequences which such person may have become subject to by reason of his default in making the same within the time so limited. The time for making any such payment, transfer, or deposit may be also, if necessary, extended by a supplemental order, referring to the former order, but without repeating the directions for such payment, transfer, or deposit. Such supplemental order may be made on an application to the judge at chambers.

Persons may bring funds into Court though time limited by order has expired.

* As to the notice to be given in such case, see the fourth of the Amended Orders, p. 428, *post*.

Proceedings on payment in of money, or deposit of securities.

28. When money or securities are to be paid into, or deposited in, Court, such payment or deposit shall be made with the privity of the Chancery Paymaster, and the Chancery Paymaster shall issue a direction to the bank to receive and place the same to the credit of the Chancery Pay Office account; and such direction shall specify the title of the cause or matter to which such money or securities are to be placed in the books at the Chancery Pay Office; and upon such money or securities being so paid or deposited, the bank shall cause a receipt to be given for the same, and shall send such direction to the Chancery Pay Office, with a certificate thereon, that the money or securities therein specified have been received, and placed to the credit of the Chancery Pay Office account.

Proceedings on transfer of securities into Court.

29. When securities are to be transferred into Court, such transfer shall be made with the privity of the Chancery Paymaster, and the Chancery Paymaster shall issue a direction for the transfer to be made to the account of

Rules, 1874. Bringing funds into Court.

the Paymaster General for the time being on behalf of the Court of Chancery; and such direction shall specify the title of the cause or matter to which such securities are to be placed in the books at the Chancery Pay Office; and upon such securities being so transferred, the bank, or body corporate, or company, in whose books the transfer of such securities is made or registered, shall send such direction to the Chancery Pay Office, with a certificate thereon, that the securities therein specified have been transferred to the said account.

Receipt and certificate of payment, deposit, or transfer.

30. When any such direction as is mentioned in the last two preceding rules with a certificate thereon that the amount of money or securities therein mentioned has been so paid, transferred, or deposited, shall be received at the Chancery Pay Office, the Chancery Paymaster shall file a certificate of such payment, transfer, or deposit, and shall therein state the title of the cause or matter to which such amount of money or securities has been placed in the books at the Chancery Pay Office; and an office copy of such certificate of the Chancery Paymaster shall be received as evidence of the payment or transfer into, or deposit in, Court therein mentioned having been made.

Conditional lodgment of money at the bank in urgent cases.

31. When it is desired to bring money into Court without waiting the time necessary to obtain a direction for the bank to receive such money it may be lodged at the bank to the credit of a Chancery suspense account (subject to being dealt with as hereinafter mentioned, and not otherwise), upon a written application signed by the person desiring to lodge the same, or his solicitor, and addressed to the bank, specifying the amount, and the title of the cause or matter in Chancery in respect of which it is desired to be lodged, and upon such lodgment being made one of the cashiers of the bank shall give a certificate that the amount has been lodged to the credit of a Chancery suspense account; and in every case the person making such lodgment, or his solicitor, shall forthwith bespeak the direction for the bank to receive the money in the manner provided by rule 28, and produce such direction and certificate at the bank, for the purpose

of having the money so previously lodged transferred to the Chancery Pay Office account, and placed in the books at the Chancery Pay Office to the credit of the cause or matter mentioned in such direction, and the receipt mentioned in the said rule 28 shall thereupon be given for such money.

Rules, 1874. Bringing funds into Court.

[Rule 32 (for which see note (*a*), p. 36, *ante*), provides that when money is paid in under the Lands Clauses Act, 1845, the nature of the disability to be stated.]

Lands Clauses Act.

33. Money hereafter paid into Court pursuant to the Copyhold Acts shall be placed in the books at the Chancery Pay Office to the credit of "ex parte the copyhold commissioners," as directed by the said Acts, and in addition thereto, to the account of the particular manor in respect of which the money shall be so paid in; and in the request for a direction to receive such money the name and locality of such particular manor shall be stated.

Money paid in under the Copyhold Acts to be placed to a separate account.

[Rule 34, for which see note (*c*), p. 65, *ante*, provides that persons bringing funds into Court under the Trustee Relief Act, 1847, shall file a printed affidavit, stating the particulars therein mentioned.]

Affidavit on payment in under Trustee Relief Act.

35. Any principal money or dividends received by the bank in respect of securities standing to the Chancery Pay Office account shall be placed in the books at the Chancery Pay Office, in the case of principal money, to the credit to which the securities whereon such money arose were standing at the time of the receipt thereof, and in the case of dividends, to the credit to which the securities whereon such dividends accrued were standing at the time of the closing of the transfer books of such securities previously to the dividends becoming due.

Credit to which money and dividends received by the bank are to be placed.

Rules, 1874. Payment out and conversion of funds in Court and dividends.

V.—Payment of Money, and Sale, Transfer, or Delivery or Securities, out of Court.—Conversion of Government Securities.—Application of Dividends and Interest.

Funds, &c., in Court to be paid out, &c., only in pursuance of orders.

36. Subject to rules 46, 47, 48, 49, 62, 65, and 66,* securities in Court shall not be sold, transferred, or delivered out, and money in Court shall not be paid out (*b*) or invested in securities, and money or securities in Court shall not be carried over, and a certificate shall not be issued for the sale, transfer, or delivery of securities in Court (*c*), unless in pursuance of an order, or in the case of an investment of money or application of dividends, of a direction contained in a certificate of a master in lunacy, as authorised by the Lunacy Regulation Act, 1853, or by any general orders made thereunder.

* These rules relate to the application of accruing dividends without any order.

Payment out to married women, trustees, &c.

(*b*) As to payment out to married women, trustees, &c., see note (*f*), p. 37, *ante*.

Prospective orders.

A prospective order for payment out of sums hereafter to be paid in was made in *Re Chamberlain*, 22 Beav. 286; *Lambie* v. *Lambie*, 9 Hare, App. 84; but see *Re Bowes*, 12 W. R. 569.

For examples of prospective orders for sale of funds in Court, and payment to persons who would become entitled in the vacation, see *Fielden* v. *Hornby*, W. N. (1870) 213.

Transfer from English to Irish Chancery.

(*c*) As to transfer from the English to the Irish Chancery, see *Vaughan* v. *Marquis of Headfort*, L. R. 5 Eq. 173.

Chancery Paymaster may defer acting on orders until he receives a request.

37. When an order, or a certificate of a master in lunacy, directs the carrying over of money or securities in Court, or the investment, or placing on deposit (subject to rule 71), or payment out, of money in Court, or of dividends to accrue on securities in Court, the Chancery Paymaster may defer giving effect to such direction until a request in writing (*d*) to give effect thereto has been left at the Chancery Pay Office, but it shall be the duty of the solicitor for the person having the carriage of such order or certificate to leave it and such request at the Chancery Pay Office without unnecessary delay.

Solicitor to leave request.

(*d*) See *Re Woodcock*, L. R. 13 Eq. 183.

Mode of payment of

38. When money in Court is to be paid out (except in

the cases provided for by rules 41, 57, and 58,* and by the 4th and 5th of the General Orders in Lunacy of 10th January, 1870), the Chancery Paymaster shall cause a cheque or other sufficient authority or direction for the payment of the same to be issued. Such cheque or authority or direction for payment, shall state the title of the cause or matter in the books at the Chancery Pay Office to which the money paid is to be debited, the date of the order or other authority in pursuance of which, and the name of the person to whom the payment is to be made, or so much of the particulars of such payment as the Chancery Paymaster may deem necessary; and such cheque or authority or direction, duly endorsed by the payee named therein or his lawful attorney, or an acknowledgment of receipt signed by such payee or his attorney, shall be a good discharge to the Chancery Paymaster for the amount therein mentioned.

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money out of Court.

* These rules relate to payment out to official persons or for legacy duties or for fees of taxation.

39. Money in Court periodically payable at the commencement of the Chancery Funds Rules, 1872, shall continue to be payable by the Chancery Paymaster in pursuance and on the authority of the entries of the cheques for periodical payments in the receipt books in the Accountant General's Office, or of such other documents as the Accountant General had been accustomed to use in the preparation of such cheques, without the production of the orders and other documents in pursuance whereof such payments are made being necessary.

Continuation of certain periodical payments.

40. Cheques which before the commencement of the Chancery Funds Rules, 1872, had been signed by the late Accountant General or by any of his predecessors, but have not been paid at the commencement of these rules, shall be a sufficient authority to the Chancery Paymaster to cause payments to be made to the same persons and of the same amounts as are named in such cheques, without the production of the orders or other documents in pursuance whereof such cheques were so signed being necessary.

Renewal of unpaid cheques of the Accountant-General.

41. When money in Court is payable to the Receiver

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General of Inland Revenue (in any case not provided for by rule 57), the National Debt Commissioners, the Ecclesiastical Commissioners for England, the official trustees of charitable funds, the official liquidator of any company, or any other official persons for whom an account is kept at the bank, the order shall direct the amount so payable to be transferred, upon the requisition of the official persons to whom it is due, to the proper account, (citing it), at the bank, of such official persons. And the Chancery Paymaster shall, upon receiving such requisition, direct the bank to write off from the Chancery Pay Office account the amount so payable, and to place it to the account at the bank mentioned in such order, and shall debit therewith the proper account in the books at the Chancery Pay Office.

Payments to official persons to be made by transfer.

Particulars to be expressed in certificates for sale, transfer, or delivery of securities.

42. Every certificate for the sale, transfer, or delivery of securities in Court shall express the exact amount of money to be raised by sale, or the exact amount and description of securities to be sold, transferred, or delivered out; and no such certificate shall be issued by a master in lunacy, except on the production of an office copy of the report of a master in lunacy confirmed by fiat; nor by the registrar in lunacy, except on the production of an office copy of the order in lunacy; nor by a registrar of the Court, except on the production of the original order, or an office copy thereof, if the absence of the original order shall be accounted for to the satisfaction of such registrar.

Sale of securities.

43. When securities in Court are to be sold, and a registrar of the Court, or a master or registrar in lunacy, has issued a certificate authorising the sale, the Chancery Paymaster shall issue a direction to the bank to receive the proceeds of such sale, and to place them to the Chancery Pay Office account, and shall specify in such direction the title of the cause or matter to the credit of which such proceeds are to be placed in the books at the Chancery Pay Office, and such title shall be the title of the cause or matter to the credit of which the securities were standing at the time of such sale, and the bank, or

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body corporate, or company, in whose books, or with whom, the securities to be sold are standing or deposited, shall, upon the production of the receipt from the bank for the proceeds of the sale, and of the certificate of a registrar of the Court, or a master or registrar in lunacy, authorising such sale, countersigned by the Chancery Paymaster, cause the transfer or delivery of the securities necessary to complete the sale to be made by their proper officer.

Conversion (in lieu of sale) of certain Government securities.

44. When a specific amount of Government securities in Court consisting of either Consolidated 3*l.* per centum annuities, or reduced 3*l.* per centum annuities, or new 3*l.* per centum annuities, of not less than 1,000*l.* is required to be realized, the order,* instead of directing a sale of such securities, shall direct the same to be converted into cash, unless the Court on pronouncing such order otherwise directs ; and a registrar of the Court or a master or registrar in lunacy shall issue a certificate for the transfer of such securities to the account of the National Debt Commissioners on behalf of the Court of Chancery, as provided in rule 84.

* The order may be in chambers. (Amended Orders, r. 13, p. 429, *post*).

Transfer of securities out of Court.

45. When securities in Court are to be transferred or delivered out, and a registrar of the Court, or a master or registrar in lunacy, has issued a certificate authorising such transfer or delivery, the Chancery Paymaster shall issue a direction for such transfer or delivery, and specify in such direction the title of the cause or matter to the credit of which such securities are standing in the books at the Chancery Pay Office, and the amount and description of the securities to be transferred or delivered, and the name of the person to whom the transfer or delivery is to be made; and upon the receipt of such direction, and of the certificate of a registrar of the Court, or a master or registrar in lunacy authorising such transfer or delivery, countersigned by the Chancery Paymaster, the bank, or body corporate, or company, in whose books, or with whom, such securities shall be standing or deposited, shall cause such transfer or delivery to be made by their proper officer, and shall send such direction to the Chancery Pay

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Office, with a certificate thereon that the transfer or delivery therein mentioned has been made to the person named therein.

Application of dividends accruing on securities transferred.

46. When securities in Court are directed to be transferred or delivered out, dividends accruing thereon subsequently to the date of the order directing the transfer or delivery (when the amount of the securities to be transferred or delivered is specified in such order, or if not so specified then subsequently to the time when the amount of such securities shall be ascertained), shall be paid to the persons to whom the securities are to be transferred or delivered, unless such order otherwise directs. When securities in Court are directed to be realized, and the whole of the proceeds paid out or carried over in one sum, or in aliquot or proportionate parts (except when the realization is to raise a specific sum of money), any dividends accruing on such securities subsequent to the date of the order directing the realization (if the amount of such securities is specified in the order, or if not so specified, then subsequently to the time when such amount shall be ascertained), shall be added to such proceeds, and applied in like manner therewith, unless such order otherwise directs.

Apportionment.

When such dividends have been invested.

47. When under an order directing the transfer or delivery of securities dividends accruing thereon would be payable to the persons to whom such securities are directed to be transferred or delivered, and pursuant to a general or other previous order such dividends have been invested, the securities purchased with such dividends shall, unless otherwise directed, be transferred or delivered, and any dividends accrued in respect thereof shall be paid to such persons.

When dividends otherwise applicable have been invested.

48. In every case (other than that provided for by the last preceding rule), when by an order dividends are directed to be dealt with so that the same ought not to be invested, and subsequently to the date of such order such dividends or any part thereof shall have been invested, the securities purchased with such dividends shall, unless otherwise directed, be sold, and the proceeds of such sale

and any dividends accrued in respect of such securities shall be applied in the same manner as the dividends so invested would have been applied under such order if they had not been so invested.

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49. In the cases provided for by the last two preceding rules, the registrars of the Court, and the masters and registrar in lunacy, may, upon production to them of a certificate of such investment as therein mentioned, issue certificates for transfer, delivery, or sale, according to the provisions of the said rules.

Certificates for transfer, sale or delivery under the last two preceding rules.

50. When subsequently to the date of an order dealing with money in Court such money shall have been placed on deposit, or when dividends accruing subsequently to the date of an order under which such dividends are applicable shall have been placed on deposit, the same when withdrawn from deposit, and any interest credited in respect thereof, shall, unless the order otherwise directs, be applied in the same manner as such money or dividends would have been applied had the same not been so placed on deposit.

Application of money or dividends placed on deposit after date of order dealing therewith.

51. When an order directs money in Court to be invested, and subsequently to the date of such order the money shall have been placed on deposit, interest accruing in respect of such money shall be applied in the same manner as the dividends arising from such investment are directed to be applied.

Application of interest on money placed on deposit after date of order directing its investment.

52. When money in Court is directed to be paid, or securities in Court are directed to be transferred or delivered, to a woman who is not married at the date of the order, and such woman shall marry before payment of such money, or transfer or delivery of such securities, such money, if it does not in the whole exceed 200*l.* of principal money, or 10*l.* in annual payments, or such securities if they, or the aggregate of such securities and money, do not exceed in value 200*l.* sterling (*f*), may be paid, transferred, or delivered to such woman and her husband, upon proof of the marriage, and upon an affidavit of such woman and her husband that no settlement or agreement for a settlement whatsoever has been made or entered into, before,

Payment to married women who have married since order (From Cons. Ord. I. rr. 1, 2, 3).

Affidavit of no settlement.

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upon, or since their marriage (*g*), or in case any such settlement or agreement for a settlement has been made or entered into, then upon an affidavit of such woman and her husband identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband that such solicitor has carefully perused such settlement or agreement for a settlement, and that, according to the best of his judgment, such money or securities are not, nor is any part thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby; and upon proof of the marriage and production of such affidavits, the registrar may issue a certificate authorising the transfer or delivery of such securities to such woman and her husband.

Sums over 200*l.*

(*f*) Where a sum was over 200*l.*, but would be reduced below that sum after payment of certain costs to which it was liable, the Court refused to allow it to be paid out to the husband without his wife's consent in court (*Beaman* v. *Dodd*, 13 L. J. Ch. 141). But this case was not followed by V-C. Stuart in *Roberts* v. *Collett*, 1 Sm. & Giff. 138.

Equity to a settlement.

The wife, if she insists on her right, is entitled to a settlement, though the fund be under 200*l.*, *Re Cutler*, 14 Beav. 220; *Re Kincaid's Trusts*, 1 Drew. 326; but if the sum is under 200*l.* she may waive her equity to a settlement without being separately examined. If it is over 200*l.*, a married woman waiving this equity must be examined, even when it is asked that the money may be paid to her instead of to her husband, *Maiwe* v. *Heaviside*, 7 Jur. N. S. 817; *Gibbons* v. *Kelley*, 10 W. R. 55 (where the lady was resident abroad and a commission was directed). See Daniell, 98, and notes to *Lady Elibank Montolieu*, 1 White & Tudor's Leading Cases.

See as to payment out of *unascertained* sums belonging to a married woman, *Moss* v. *Dunlop*, Johns. 490; *Anon.*, 5 Jur. N. S. 1124; Daniell, 97.

Court dispensing with affidavit of no settlement.

(*g*) See as to the Court dispensing wholly or partially with the affidavit of no settlement, *Anon.*, 3 Jur. N. S. 839; *Hedges* v. *Clarke*, 1 De G. & Sm. 354; *Clark* v. *Woodward*, 25 Beav. 455; *Veal* v. *Veal*, L. R. 4 Eq. 115; *Wilkinson* v. *Schneider*, L. R. 9 Eq. 424; *Woodward* v. *Pratt*, L. R. 16 Eq. 127.

Payment to representatives of deceased persons or co-partners.

53. When a person to whom payment of money in Court or transfer or delivery of securities in Court is directed shall appear to be entitled thereto as real estate, or as trustee, executor, or administrator, or otherwise than in his own right or for his own use, the fact that he is entitled to the same as real estate, or the character

in which he is so entitled, shall be stated in the order or in the certificate of a chief clerk, or of a taxing master, or of a master in lunacy.

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And when money in Court is payable, or securities in Court are transferable or deliverable to any person named or described in an order, or in a certificate of a chief clerk, or of a taxing master, or of a master in lunacy (except to a person therein expressed to be entitled to such money or securities as real estate, or to be entitled thereto as a trustee, executor, or administrator, or otherwise than in his own right, or for his own use), such money or securities or any portion thereof for the time being remaining unpaid or untransferred or undelivered, may, unless the order otherwise directs, on proof of the death of such person, whether on or after the date of such order, be paid or transferred or delivered to the legal personal representatives of such deceased person, or to the survivors or survivor of them.

And when money in Court is by an order directed to be paid to any persons described in an order or a certificate of a chief clerk, or of a taxing master, or of a master in lunacy, as co-partners, such money may be paid to any one or more of such co-partners.

Payments, transfer, or delivery to surviving co-partners or representatives (from Cons. Ord. I. r. 5).

54. When money in Court is payable to any persons as co-partners, or when money in Court is payable, or securities in Court are transferable or deliverable to any persons as legal personal representatives, such money or securities, or any portion thereof for the time being remaining unpaid, untransferred, or undelivered, may, upon proof of the death of any of such co-partners or representatives, whether on or after the date of the order directing such payment, transfer, or delivery, be paid, transferred, or delivered to the survivors or survivor of them.

Payment to *trustees* or survivor.

(*h*) Where they are also trustees the order must provide for payment to the survivors or survivor, *Jeffryes* v. *Smith*, 11 W. R. 479.

Certificates of registrar

55. In the case of securities transferable or deliverable under either of the last two preceding rules, the registrar

Rules, 1874. Payment out and conversion of funds in Court and dividends.

may (upon proof of the death of any of such representatives) issue a certificate authorising the transfer or delivery of such securities to such representatives, or to the survivors or survivor of them.

(from Cons. Ord. I. r. 7). Grant of probate or administration (Cons. Ord. I. rr. 8, 9, amended).

56. No money or securities shall, under rules 53 and 54, be paid, transferred, or delivered out of Court to the legal personal representatives of any person under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years (*k*) from the date of the order directing such payment, transfer, or delivery, or in case such money consists of interest or dividends from the date of the last receipt of such interest or dividends under such order.

Where representation taken out after six years.

(*k*) See *Edwards* v. *Harvey*, 11 W. R. 330, where the Court would not pay out money to personal representatives of a person long dead, but required the consent of the beneficiaries.

Payment of legacy or succession duty.

57. The Chancery Paymaster, before acting upon an order for the payment, transfer, or delivery of money or securities in respect of which legacy or succession duty is (under rule 14) stated to be payable, shall require the production of the official receipt for such duty, or a certificate from the proper officer of the payment thereof. And for better security against the payment or transfer by the Chancery Paymaster of any money or securities chargeable with any such duty without the duty being first paid, the Chancery Paymaster, on receiving notice from the proper officer that the duty is payable, shall cause a memorandum to be made in his books in conformity with such notice. And when an order shall have been left at the Chancery Pay Office, for the purpose of giving effect to any direction for the transfer of such duty to the account of the Receiver General of Inland Revenue at the bank, together with the requisition of the commissioners of Inland Revenue for such transfer, and such other evidence as may be necessary for verifying the amount of such duty, the Chancery Paymaster shall direct the bank to transfer the amount of such duty to

the said account, and shall debit such amount to the proper account in the books at the Chancery Pay Office.

Rules, 1874. Payment out and conversion of funds in Court and dividends.

58. When costs are directed to be paid out of money in Court, or out of the proceeds of securities in Court, the taxing master shall certify the amount of the fees of taxation payable in respect of such costs, unless he shall certify that such fees are included in the costs as taxed. The Chancery Paymaster shall carry over the amount so certified to be payable from the account to which such money or proceeds are placed to a separate account in the books at the Chancery Pay Office for fees of taxation; and the amount so carried over shall from time to time, as the treasury may direct, be paid to the account of Her Her Majesty's Exchequer.

Carrying over fees of taxation.

59. In acting on orders directing any annuity or maintenance to be paid, or any other periodical payments to be made, out of the dividends which have accrued since the 5th day of April, 1871, or which may hereafter accrue on securities in Court, or hereafter to be in Court, and in respect of which dividends income tax shall have been deducted, the Chancery Paymaster shall draw only for so much of the sums directed by such orders respectively to be paid as shall remain after making a deduction therefrom at the same rate as the bank shall certify to have been deducted from such dividends for income-tax, except in cases in which such sums shall be directed to be paid without making any such deduction.

Deduction of income-tax on payments of or out of dividends.

VI.—Investment of Money.

Rules, 1874. Investments of funds in Court.

60. When money in Court is, in pursuance of an order, to be invested in specified securities, the Chancery Paymaster shall direct the money to be paid to the broker (*l*) conditionally upon his causing such securities to be transferred or deposited to the account of the Paymaster General for the time being on behalf of the Court of Chancery, and the cheque or authority or direction for payment of such money shall specify the title of the cause or matter, to the credit of which the securities purchased

Investment in specified securities.

Rules, 1874. Investments of funds in Court.

are to be placed in the books at the Chancery Pay Office.

The bank, or body corporate, or company, in whose books or with whom the transfer or deposit of such securities shall be made or registered, shall cause a certificate of such transfer or deposit to be issued; and such a certificate purporting to be issued by the bank, or body corporate, or company aforesaid, shall be sufficient evidence, for all purposes, that such transfer or deposit as therein mentioned has been actually made; and the securities so transferred or deposited shall be placed in the books at the Chancery Pay Office to the same credit as that to which the said money was standing at the time of such investment, unless the order authorising such investment otherwise directs.

Broker to be employed.

(*l*) A person paying money into Court which he desires to have invested, must employ the broker of the paymaster-general, *Re The Undertaking of the West Riding, &c., Railways Bill*, W. N. (1876) 48, 80.

Investment of accruing dividends under an order (Cons. Ord. I. r. 12, amended).

61. When an order directing the investment from time to time of dividends accruing on securities in Court, or to be transferred into Court, or directed to be purchased with money in Court, or to be paid into Court, is left at the Chancery Pay Office, together with a request for the purpose of having such direction for investment of dividends carried into effect, the Chancery Paymaster shall, without any further request, from time to time, until he shall receive a request or notice of an order to the contrary, invest such dividends, if amounting to or exceeding 40*l.* half yearly, together with all accumulations of dividends thereon, as soon as conveniently may be after they shall accrue due and have been received, in the particular description of securities named in the order directing such investment.

Purchase of exchequer bills or bonds (Cons. Ord. I. r. 13).

62. When money in Court is by an order directed to be invested in exchequer bills or exchequer bonds, and when exchequer bills or exchequer bonds are, in pursuance of an order, deposited in Court to the credit of any cause or matter, any principal money or interest which may

thereafter be received and paid into the bank in respect of such bills or bonds, or of any such bills or bonds to be purchased with principal money or interest in pursuance of this rule, or in respect of any such bills or bonds for which the same may be exchanged, shall from time to time, as the same shall be so received and paid into the bank, be also invested by the Chancery Paymaster, without any further request, unless such order otherwise directs, or until he receives a request or notice of a further order to the contrary, in exchequer bills or exchequer bonds which shall be placed to the same credit.

Rules, 1874. Investment of funds in Court.

63. When and so often as any exchequer bills or other securities now or hereafter to be deposited at the bank to the credit of the Chancery Pay Office account shall be in course of payment, the bank shall, without any direction from the Chancery Paymaster, cause all such bills or other securities so in course of payment to be delivered to one of the cashiers of the bank, who is to receive the interest due thereon, and in the case of exchequer bills to exchange the same for new bills, if new bills are issued, or otherwise to receive the principal money and interest due on such of the said bills so in course of payment as cannot be exchanged, and pay such interest or principal and interest (as the case may be), into, and deposit all such new bills in the bank to the Chancery Pay Office account.

Bank to renew exchequer bills, and to receive principal and interest of securities when paid off.

And the bank is forthwith after every such exchange or receipt of principal or interest to certify to the Chancery Paymaster, without any direction from him for that purpose, the numbers, dates, and amounts of the exchequer bills so exchanged or paid off, and also the numbers, dates, and amounts of the new bills taken in exchange, and the amount of the interest, or principal money and interest (as the case may be), received on each bill or set of bills, and upon receiving such certificate the Chancery Paymaster shall place such new bills and such principal money and interest to the credit in the books at the Chancery Pay Office of the cause or matter to which the bills so exchanged or paid off were placed.

Rules, 1874. Investment of funds in Court.

64. A sum of money in Court less than 40*l.* shall not be invested in securities, except in the cases provided for by rules 65 and 66.

Limit of amount to be invested.

This rule shall extend to the investment of dividends accruing on securities in Court which have been or may be directed or requested to be invested; and such dividends when amounting to less than 40*l.* half-yearly are (subject to rules 37, 65, 66, and 73)* to be placed on deposit.

* By these rules solicitors must make request for investment, and sums under 10*l.* are not to be on deposit.

65. The dividends accruing on securities purchased as mentioned in the 11th rule† of the 1st of the Consolidated Orders of the Court (abrogated by rule 3 of these rules), previously to the commencement of the Chancery Funds Rules, 1872, may, when or so soon as they amount to or exceed 10*l.*, be invested in like manner as the same would have been invested if the said 11th rule had not been abrogated.

† Relating to the Legacy Duty Act, see *infra*.

Money paid in under 36 Geo. 3, c. 52, may be invested on request.

A sum of money amounting to or exceeding 40*l.* paid into Court after the commencement of these Rules, in pursuance of the Act‡ of 36 George 3, c. 52, s. 32, shall, upon a written request (*m*) of the person paying it in or of his solicitor, or upon a written request made by or on behalf of a person claiming to be entitled thereto or interested therein, be invested (without an order) in consolidated 3*l.* per centum annuities; and the dividends accruing in respect thereof, when or so soon as they shall amount to or exceed 10*l.*, shall be from time to time invested in like annuities, if so requested either in the original request or in a subsequent request. And if such money shall have been placed on deposit before such request shall be left at the Chancery Pay Office, such money and any interest to be credited in respect thereof, if amounting to 40*l.*, shall upon a like request, be withdrawn from deposit and invested as before mentioned.

‡ Legacy Duty Act, p. 64, *ante*.

(*m*) See *Re Woodcock*, L. R. 13 Eq. 185.

Investment of money paid in under the

66. Notwithstanding the abrogation of the 3rd rule of the 41st of the Consolidated Orders of the Court (by rule

3 of these rules)* all dividends subject at the commencement of these rules to be invested in pursuance of the said 3rd rule of the said order, may, when or so soon as they amount to or exceed 10*l.*, be invested as if the said 3rd rule had not been abrogated.

Rules, 1874. Investment of funds in Court.

Trustee Relief Act.

When the affidavit referred to in rule 34† contains a statement that it is desired that the money intended to be paid into Court in pursuance of the Act of the 10th and 11th Vict. c. 96, or the dividends accruing on the securities intended to be transferred or deposited in pursuance of the said Act, and the accumulations thereon, shall be invested in consolidated 3*l.* per centum annuities, or reduced 3*l.* per centum annuities, or new 3*l.* per centum annuities, the Chancery Paymaster shall (if or so soon as such money shall amount to or exceed 40*l.*, or such dividends shall amount to or exceed 10*l.*), invest the same respectively in consolidated 3*l.* per centum annuities, or reduced 3*l.* per centum annuities, or new 3*l.* per centum annuities, without any order or further request for that purpose. But if such money does not amount to 40*l.*, the Chancery Paymaster shall, subject to rule 73, as soon as conveniently may be, place such money on deposit without a request for that purpose, unless such affidavit contains a statement that it is deemed unnecessary to place such money on deposit, or unless notice in writing be left at his office of an order having been made, or of an intended application to the Court, affecting such money, securities, or dividends (*n*).

* Relating to the Trustee Relief Act, p. 63.

† See note p. 65, *ante*.

(*n*) See pp. 65, 66, *ante*.

67. In all cases, upon a request in writing by a solicitor acting on behalf of any person claiming to be entitled to or interested in money or securities in Court, that such money or the dividends or interest accruing on any specified securities, or on any specified sum of money on deposit, may not be placed on deposit or invested, being at any time left at the Chancery Pay Office, the Chancery Paymaster shall not place such money on deposit, or shall be at liberty to cease to place on deposit or invest any

Investing or placing on deposit stayed or discontinued on request.

Rules, 1874. Investment of funds in Court.

more dividends or interest accruing on such securities or sum of money on deposit, until he has had notice that the Court has made some order in that behalf.

Rules, 1874. Funds in Court on deposit.

VII.—Money on Deposit and Interest thereon.

In what cases money will be placed on deposit.

68. Subject to any exceptions in these rules, money in Court paid in before the commencement of the Court of Chancery (Funds) Act, 1872, and not already placed on deposit (other than money paid in pursuant to the Copyhold Acts or to the 69th section of The Lands Clauses Consolidation Act, 1845), and money arising by the sale, conversion, or payment off of securities in Court, or dividends accruing on securities in Court, or money brought over from the credit of some other cause or matter, or otherwise placed, either before or after such commencement, to the credit of a cause or matter in the books at the Chancery Pay Office, shall be placed on deposit on a request signed by any person claiming to be interested in such money, or by his solicitor ; and, subject as aforesaid, all money hereafter to be paid into Court shall be placed on deposit without a request for that purpose.

Money not to be placed on deposit in certain cases.

69. If a direction in an order dealing with money in Court otherwise than by directing it to be placed on deposit, whether such money has been paid in before or since the commencement of the Court of Chancery (Funds) Act, 1872, is brought under the notice of the Chancery Paymaster, or if a request in writing by a solicitor acting on behalf of a person claiming to be entitled to or interested in money in Court, paid in after the commencement of the same Act, that such money may not be placed on deposit, is left at the Chancery Pay Office, such money respectively shall not be placed on deposit, but the person making such request may at any time withdraw the same, and by a like request in writing require the money to be placed on deposit.

Time for placing money on deposit.

70. The placing on deposit of money paid into Court after the commencement of these rules shall not be

deferred beyond the 15th or the last day of the month in which it shall be paid into Court, whichever day shall first happen after such payment, or in the case of money paid into Court on the last day of a month, the placing on deposit shall not be deferred beyond the 15th day of the following month ; and when a request to place money in Court on deposit shall be left at the Chancery Pay Office, the money shall (except in the case provided for in rule 71), be so placed on the day succeeding the day on which such requests shall be so left (which last-named day shall be the date inserted in such request).

Rules, 1874. Funds in Court on deposit.

71. When an order* directs the conversion into cash of any of the Government securities mentioned in rule 44, and the whole of the money arising thereby to be placed on deposit, such money shall be deemed to have been placed on deposit (without a request for that purpose) on the day on which such conversion shall be effected.

As to placing on deposit cash arising from conversion of Government securities.

* This order may be made in chambers (Amended Orders, r. 13, p. 429, *post*).

72. Money in Court paid in pursuant to the Act 9 & 10 Vict. chap. 20, intituled "An Act to amend an Act of "the second year of Her present Majesty, providing for "the custody of certain moneys paid in pursuance of the "standing orders of either House of Parliament by "subscribers to works or undertakings to be effected under "the authority of Parliament,"† or of any Act amending the same, or money in Court paid into the Appeal Deposit Account, shall not be placed on deposit.

Exclusion of money paid in under 9 & 10 Vict. c. 20, or to the appeal deposit account.

† See p. 62, *ante*.

73. A less sum of money than 10*l*. shall not remain or be placed on deposit; and if the amount of money on deposit to the credit of a cause or matter at the commencement of these rules is less than 10*l*. it shall be withdrawn from deposit, at or as soon as conveniently may be after such commencement, without a request for that purpose.

No sum less than 10*l*. to be on deposit.

74. When an order containing directions dealing with money on deposit, or with money which after the date of the order has been placed and still remains on deposit, is brought to the Chancery Pay Office to have such directions acted on, such money, or so much thereof as may be sufficient to meet the requirements of the order, may, on

Withdrawal of money on deposit.

Rules, 1874. Funds in Court on deposit.

a request in writing signed by a person claiming to be entitled thereto or interested therein, or by a solicitor acting on his behalf, be withdrawn from deposit and applied as directed by the order, subject, as to the investment of money, to rule 64.

Limit of time for withdrawal from deposit after request.

75. When money on deposit is by an order directed to be dealt with, such money shall be withdrawn from deposit as soon as may be after a request in writing for such withdrawal has been left at the Chancery Pay Office, and such withdrawal shall not be deferred beyond a week after the leaving of such request.

No interest computed on a fraction of 1*l.*

76. Interest upon money on deposit shall not be computed on a fraction of one pound.

For what period interest is to be computed.

77. Except as in this rule otherwise provided, interest upon money on deposit shall accrue by half calendar months, and shall not be computed for any less period. The periods from the 1st to the 15th of a month, both days inclusive, and from the 16th to the last day of a month, both days inclusive, shall, for the purpose of computing such interest, be reckoned as half calendar months; and such interest shall begin on the first day of the half calendar month next succeeding that in which the money is placed on deposit, and shall cease from the last day of the half calendar month next preceding the withdrawal of the money from deposit: Provided that when a sum of money in Court amounting to not less than 500*l.* shall be hereafter placed on deposit, pursuant to a request in writing by or on behalf of a person claiming to be interested therein, and shall remain on deposit undealt with until the first of April or the first of October next succeeding the day on which it is placed on deposit, interest shall begin on the day inclusive next succeeding such day of placing on deposit.

When interest is to be credited.

78. Interest which has accrued for or during the half years ending respectively the 31st of March and the 30th of September in every year on money then on deposit shall, on or before the 20th days of the months respectively following, be credited by the Chancery Paymaster to the cause or matter to the credit of which such money

shall be standing, on every such half yearly day. And when money on deposit is withdrawn from deposit, except as to money withdrawn during the first fifteen days of the months of April and October respectively, the interest thereon which has accrued and has not been credited shall, at the time of withdrawal, be credited to the cause or matter to the credit of which the money is then standing. Rules, 1874. Funds in Court on deposit.

79. When money on deposit to the credit of a cause or matter consists of sums which have been placed on deposit at different times, and an order is made dealing with the money to the credit of such cause or matter, and part of such money has to be withdrawn from deposit for the purpose of executing such order, the part or parts of the money dealt with by such order last placed and remaining on deposit at the time of such withdrawal shall, for the purpose of computing interest, be treated as so withdrawn, unless the order otherwise directs. Mode of calculating interest in certain cases on parts of money withdrawn.

80. Until a direction in an order dealing with interest on money on deposit, credited to a cause or matter as having become due on either of the half yearly days mentioned in rule 78, has been brought under the Chancery Paymaster's notice, such interest shall, when or so soon as it amounts to or exceeds 10*l.*, be placed on deposit, and for the purpose of computing interest upon it shall be treated as having been placed on deposit on the last half yearly day on which any such interest became due. Placing of interest on deposit.

VIII.—Transactions with National Debt Commissioners.

Rules, 1874. Funds in Court.

[Rules 81—85 provide how the surplus of money in Court is to be transferred to National Debt Commissioners, and any deficiency of money in Court to be made good by National Debt Commissioners; also that the National Debt Commissioners are to give credit for interest on money on deposit, and are on proper notification to proceed in the conversion of Government securities into cash.]

Rules, 1874. Funds in Court.

IX.—Miscellaneous.

Chancery Paymaster may act on affidavits or statutory declarations in ascertaining apportionments, &c.

86. When evidence is required by the Chancery Paymaster for the purpose of ascertaining the amounts of any residue or aliquot or proportionate part of money or securities dealt with by an order, or for otherwise carrying into effect the directions of an order, he may, without any direction in such order for that purpose, receive and act upon an affidavit, or upon a statutory declaration under the Act of 5 & 6 Wm. IV. chap. 62, instead of an affidavit, and every such statutory declaration shall be filed in the report office when the Chancery Paymaster shall consider it necessary.

Chancery Paymaster may furnish particulars of funds in Court.

87. The Chancery Paymaster, upon a request in writing made by or on behalf of a person claiming to be interested in money or securities standing in the books at the Chancery Pay Office to the credit of a cause or matter stated in such request, may, in his discretion, issue, for the information of a judge or an officer of the Court, a certificate of the amount and description of such money or securities, and such certificate shall have reference to the morning of the day of the date thereof, and not include the transactions of that day, and the Chancery Paymaster shall notify on such certificate the dates of any orders restraining the transfer, sale, delivery out, or payment, or other dealing with the securities or money in Court to the credit of the cause or matter mentioned in such certificate, and any charging orders, affecting such securities or money, of which respectively he has had notice, and with respect to any restraining or charging orders hereafter to be made, the names of the persons to whom notice is to be given, or in whose favour such restraining or charging orders have been made.

And when a cause or matter has been inserted in the list referred to in rule 91, the fact shall be notified on the certificate relating thereto.

Chancery Paymaster may issue

88. Upon a request in writing made by or on behalf of a person claiming to be interested in money or securities

standing in the books at the Chancery Pay Office to the credit of a cause or matter stated in such request, the Chancery Paymaster may, in his discretion, issue a transcript of the account in the said books in respect of such cause or matter; and if so required by the person to whom it is issued, such transcript shall be authenticated at the Chancery Audit Office.

transcripts of his accounts.

89. When securities have been purchased, sold, transferred, or delivered out, or money or securities have been carried over, or otherwise dealt with in the books at the Chancery Pay Office, the Chancery Paymaster may in his discretion issue a certificate thereof, upon a request in writing made by or on behalf of any person claiming to be interested in such money or securities.

Chancery Paymaster may certify as to purchases, sales, or other dealings with securities.

90. The Chancery Paymaster may in his discretion, on a request in writing, supply such information with respect to any transactions in the Chancery Pay Office as may from time to time be required in any particular case.

Chancery Paymaster may give other information as to transactions.

91. As soon as conveniently may be after the 1st of September, 1875, and after the same day in every succeeding third year, a list shall be prepared by the Chancery Paymaster, and filed in the report office, and a copy thereof shall be inserted in the "London Gazette," and exhibited in the several offices of the Court, of the titles of the causes and matters in the books at the Chancery Pay Office (other than the causes or matters referred to in rule 92), to the credit of which any securities, or any money amounting to or exceeding 50*l.*, may be standing, which money or the dividends on which securities have not been dealt with by the Accountant General or by the Chancery Paymaster (otherwise than by the continuous investment or placing on deposit of dividends) during the fifteen years immediately preceding such 1st of September,* and no information shall be given by the Chancery Paymaster respecting any money or securities to the credit of a cause or matter contained in any such list until he has been furnished with a statement in writing by a solicitor requiring such information, of the name of the person on whose behalf he applies, and that, in such soli-

List of funds undealt with to be published triennially.

* As to petitions relating to these funds, see Amended Orders, r. 14. p. 429, *post.*

Rules, 1874. Funds in Court.

citor's opinion, the applicant is beneficially interested in such money or securities.

Transfer of small balances to a separate account.

92. As soon as conveniently may be after the 1st of September, 1875, and the same day in each succeeding year, the Chancery Paymaster shall carry over to a separate account in his books for causes and matters on which the balances do not exceed 5*l.* the balances of money and securities standing in such books to the credit of the causes or matters on which such balances of money and securities do not together amount to 5*l.*, and on which the money or securities shall not have been dealt with during the preceding five years. When an order dealing with money or securities carried over under this rule is brought to the Chancery Pay Office to be acted upon, the Chancery Paymaster shall carry back such money or securities and any dividends accrued thereon to the credit of the cause or matter from which they were so carried over, and shall deal therewith as directed by such order.

Solicitors to insert their names and addresses on documents left in the Chancery Pay Office.

93. Every order or request that may be left at the Chancery Pay Office, and every statutory declaration or other document required to be retained there for the purpose of carrying into effect an order, may be printed or written, and shall have printed or written thereon the name and address of a solicitor.

Titles of accounts not to exceed thirty-six words.

94. The length of the title of any account hereafter directed by an order, or requested pursuant to an Act of Parliament or otherwise, to be raised in the books at the Chancery Pay Office shall not exceed thirty-six words, exclusive, in the case of a separate account in a cause or matter, of the title of the cause or matter in which such separate account is raised: Provided that if a sufficient reason be assigned to the satisfaction of the registrar for extending beyond thirty-six words the title of an account directed by an order to be raised, such title may be so extended; and the registrar shall in such case add to the direction to raise such account the words "notwithstanding rule 94"; and provided that if a sufficient reason be assigned, to the satisfaction of the Chancery Paymaster, for so extending the title of an account requested to be raised, such title

Rules, 1874. Funds in Court.

may be so extended; and the Chancery Paymaster shall in such case add the said words to the direction under the authority of which such account is to be raised: In such title four figures shall be reckoned as one word.

This rule shall not apply to any account which has been directed to be raised by an order dated before the 7th day of January, 1873; and any account directed to be raised by an order dated since the 7th day of January, 1873, but before the commencement of these rules shall be deemed to have been properly entitled notwithstanding the length of the title of such account may exceed thirty-six words.

Index of documents filed at the Report Office.

95. An index shall be made and kept in the report office of the Court of all documents by these rules directed to be filed there.

CHANCERY FUNDS AMENDED ORDERS, 1874.

Amended Orders, 1874. Funds in Court.

ORDERS OF COURT,

UNDER THE COURT OF CHANCERY (FUNDS) ACT, 1872, 35 & 36 VICT. CAP. 44; AND THE TRUSTEE RELIEF ACT, 1847, 10 & 11 VICT. CAP. 96.

The 22nd day of December, 1874.

Commencement of orders.

[Rule 1 revoked the Chancery Funds Orders, 1872, and provided that these Amended Orders should come into operation on January 11th, 1875.]

Interpretation of terms.

2. In these orders, and in orders as herein defined, terms shall have the same meaning as the same terms are defined to have in the Court of Chancery (Funds) Act, 1872, and as prescribed by the Chancery Funds Consolidated Rules, 1874;* and the term "Court" shall mean the Court of Chancery, and include a judge thereof, whether sitting in court or at chambers; and the term "order" shall include a decree; and the term "cause or matter" shall, in these orders, include a separate account in a cause or matter, and a matter intituled merely as an account; and words importing

* P. 394, *ante*.

Amended Orders, 1874. Funds in Court.

the singular number shall include the plural number, and words importing the plural number shall include the singular number; and words importing males shall include females.

[Rule 3, abrogated certain orders in Chancery, being the same as those abrogated, p. 398, *ante*.]

Notice of payment, transfer, or deposit on request.

4. A person who shall make a transfer or payment of money or securities into Court, or a deposit of securities in Court, as provided by rule 27 of the Chancery Funds Consolidated Rules, 1874, shall forthwith give notice thereof to the solicitors of the persons upon whose application the order directing such transfer, payment, or deposit was made, or to such persons if they have no solicitor; or if the order was made on the application of the person making such transfer or payment, to the solicitors of the other parties appearing on the application.

A person making a transfer, payment, or deposit upon request to the credit of a cause or matter, as provided by rule 25 of the said rules, shall forthwith give notice thereof to the solicitors on the record for the parties to the cause, or in case of a matter, to the persons interested, if known, or to their solicitors, if any, stating in such notice what the money or securities comprised in such transfer, payment, or deposit represent, and for what purpose such transfer, payment, or deposit has been made; and such notices may be sent by post.

Practice under Trustee Relief Act.

[Rules 5—10 relating to notice of payment or transfer into Court under the Trustee Relief Act (10 & 11 Vict. c. 96), and to the application by petition or summons for payment out, will be found set out p. 66, *ante*.]

Petitions to state whether duty is paid or not.

11. Every petition for dealing with money or securities in Court, chargeable with duty payable to the revenue under the Acts relating to legacy or succession duty, or the dividends on such securities, shall contain a statement whether such duty or any part thereof has or has not been paid.

Restriction on issuing certificates

12. The registrars of the court shall not, without a special direction of a judge, be required to issue certificates

for the sale, transfer, or delivery of securities in Court during any vacation in their office.

Amended Orders, 1874. Funds in Court.

13. Applications under the Court of Chancery (Funds) Act, 1872, for the conversion into cash of Government securities in Court of any of the three descriptions mentioned in rule 44 of the Chancery Funds Consolidated Rules, 1874, and for placing such cash on deposit, as provided by rule 71 of the said rules, or for dealing with interest on money on deposit, may be made to the Master of the Rolls and the Vice-Chancellors respectively, while sitting at chambers.

during vacations. Application at chambers.

14. When a cause or matter has been inserted in the list mentioned in rule 91 of the Chancery Funds Consolidated Rules, 1874, the fact shall be stated in every petition or summons affecting any money or securities to the credit of such cause or matter. In cases in which the money or securities affected by such petition shall together amount to or exceed in value 500*l.*, a copy of such petition, and notice of all proceedings in Court or at chambers shall (unless the Court otherwise directs), be served on the official solicitor of the Court, who shall be at liberty to appear and attend thereon.

Petitions respecting money or securities on list of undealt-with funds.

15. Applications under the Copyhold Acts respecting any securities or money in Court, shall be made by summons at the chambers either of the Master of the Rolls or of one of the Vice-Chancellors; but notice of any such application is not to be given to the Copyhold Commissioners, except when the judge may so direct; and this order shall be deemed an additional article to the 35th of the Consolidated Orders, Rule 1.*

Applications under Copyhold Acts to be made at chambers.

* P. 138, *ante*.

16. The Clerks of Records and Writs shall not receive into their custody effects of the suitors consisting of jewels or plate, or other articles of a like nature, or negociable securities.

Certain articles and securities not to be received by Clerks of Records and Writs.

17. No order in a cause shall be passed or entered, and no certificate in a cause of a chief clerk, or of a taxing master of the Court, shall be signed or filed, and no petition in a cause shall be answered, and no summons in a cause shall be issued, and no affidavit made in a cause

Proceedings and documents in a cause to be marked with reference to record.

Amended Orders, 1874. Funds in Court.

shall be filed, until the same respectively be either marked with the reference to the record, as prescribed by the 1st of the Consolidated Orders, Rule 48,* or be inscribed with a note indicating that the cause was commenced prior to 2nd November, 1852, and the correctness of such reference may be required to be authenticated by the official seal of the Clerks of Records and Writs being impressed on every such document.

* See this rule in note to Ord. V. r. 4, *post*.

Duplicate orders to be deposited with clerks of entries.

18. The duplicate orders or records to be deposited with the clerks of entries pursuant to rule 18 of the Chancery Funds Consolidated Rules, 1874, shall annually (or oftener if the senior registrar shall direct), be bound up in volumes of convenient size, and indexed, and transmitted to the Report Office, in the same manner as written orders are now bound up, indexed, and transmitted, and written office copies or extracts may be made therefrom, subject to the existing regulations relating thereto.

Solicitors fees.

19. Solicitors shall be entitled to charge and shall be allowed the same fees on proceedings under these orders, and under the Chancery Funds Consolidated Rules, 1874, as they are, by the general orders and practice of the Court,* entitled to charge and to be allowed in respect to proceedings of a similar or analogous description; and shall be entitled to charge and shall be allowed the same fees for printed copies of orders as they are now entitled to charge and to be allowed for written copies thereof.

* An order of Court of the same date as these Amended Rules gives a schedule of fees to be paid in the Report Office for printed copies under these rules.

RULES OF THE SUPREME COURT, 1875.

FIRST SCHEDULE.

RULES OF COURT.

[NOTE.—*Where no other provision is made by the Act or these Rules the present procedure and practice remain in force.* (*See s.* 21 *of Judicature Act,* 1875, *p.* 380, *ante, and Order I. r.* 3, *infra.*)

ORDER I.

Order I.

FORM AND COMMENCEMENT OF ACTION.

Institution of action.

1. All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits (*a*) which have hitherto been commenced by bill or information (*b*) in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

Subject-matter under Cons. Ord. IX. 1.

(*a*) As to suits involving less than 20*l.*, see Act 1873, s. 67, p. 361, *ante*, and the note there citing Cons. Ord. IX. r. 1.

(*b*) The Attorney-General must sign and sanction an information before it is filed or amended (*Attorney-General* v. *Fellows*, 1 J. & W. 251; or before an action is turned into an information and action, *Caldwell* v. *Pagham Harbour Reclamation Company*, L. R. 2 C. D. 221.

Information.

Interpleader.

2. With respect to interpleaded the procedure and practice now used by Courts of common law under the Interpleader Acts, 1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126 (*c*) shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant

Order I.

shall be made at any time after being served with a writ of summons and before delivering a defence.

1 & 2 Will. 4, c. 58 (Interpleader Act).

(c) By 1 & 2 Wm. 4, c. 58, if a defendant shows that he claims no interest, but that a third party claims, and that he does not collude, but is ready to bring the subject-matter of the action into Court, the Court, or any judge thereof, may order such third party to appear and meantime stay proceedings (s. 1), and if the third party does not appear his claim may be barred (s. 3).

The same power is given to the Court (and by 1 & 2 Vict. c. 45, s. 2 to any judge) to protect sheriffs desiring to interplead (s. 6); orders made in pursuance of the Act may be entered of record and made evidence.

23 & 24 Vict. c. 126.

By 23 & 24 Vict. c. 126, the above Act is to apply to cases where the claims have not a common origin, but are adverse and independent (s. 12), and auxiliary provisions are made for the sale of goods seised in execution (s. 13), for summary decision where the property is of small value (s 14), for statement of a special case (s. 15). The judgment or decision of the Court or judge is to be final (s. 17), and ss. 19 and 50 of the Judicature Act, 1873, do not alter this rule, *Dodd* v. *Shepherd*, 34 L. T. N. S. 358.

Trustee Relief Act.

Payment into Court under the Trustee Relief Act, p 67., *ante*) is an alternative for interpleader proceedings, see Judicature Act, 1873, s. 25, (6).

Saving of former practice.

3. All other proceedings in and applications to the High Court may, subject to these rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed.

Order II.

ORDER II.

Writ of Summons and Procedure, &c.

Commencement by writ of summons.

* Ord. III. r. 2.

Practice as to writ.

Indorsement.

Name of judge, &c.

Writ for administration.

Injunction on receiver.

Amendment.

1. Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed (*a*) with a statement of the nature of the claim made,* or of the relief or remedy required in the action (*b*), and which shall specify the division of the High Court to which it is intended that the action should be assigned.

(*a*) See the form of writ in appendix of forms, *post*. A writ for administration should be entitled in the issue of the estate, *Eyre* v. *Cox*, 24 W. R. 317, and as to endorsing it "on behalf of" creditors, &c., see same case and note to Ord. XVI. r. 9, *post*.

(*b*) A plaintiff should endorse his writ with a claim for an injunction or receiver where the obtaining of either is a substantial object of his action, *Colebourne* v. *Colebourne*, L. R. 1 Ch. Div. 690; as to amendment of the indorsement, see Ord. III. r. 2.

2. Any costs occasioned by the use of any more prolix or other forms of writs, and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same, unless the Court shall otherwise direct.

Costs of prolixity.

3. The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in form No. 1 in part I. of Appendix (A) hereto, with such variations as circumstances may require (*c*).

Form of writ.

(*c*) See Appendix, p. 1.

4. No writ of summons for service out of the jurisdiction (*d*), or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or judge (*e*).

Writ for service out of jurisdiction.

(*d*) See Ord. XI., p. 458, *post*, as to service out of the jurisdiction, and the cases in which it will be allowed. The giving leave is discretionary, and a defendant cannot plead that it was wrongly given, *Preston* v. *Lamont*, 24 W. R. 928.

Discretion of Court.

(*e*) The order for service out of the jurisdiction will be made on an affidavit going to the merits, *Young* v. *Brassey*, L. R. 1 Ch. Div. 277.

Leave, when given.

The order may be made against infants, &c., and foreign corporations, see notes to Ord. XI. 1, p. 459, *post*.

The plaintiff may proceed, in case of default, without further leave from the judge, see *Scott* v. *Royal Wax Candle Company*, W. N. (1876) 92; and this is now so expressed in the writ for service out of the jurisdiction. (See form in Appendix.)

Further leave in case of default unnecessary.

5. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in form No. 2 in part I. of Appendix (A) hereto (*f*), with such variations as circumstances may require. Such notice shall be in form No. 3 in the same part, with such variations as circumstances may require.

Form of writ for service out of jurisdiction.

(*f*) See Appendix, *post*.

6. "With respect to actions upon a bill of exchange or promissory note "commenced within six months after the same shall have become due and "payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. "67, shall continue to be used."

Action on bill of exchange.

This Act is the Summary Procedure on Bills of Exchange Act, 1855 (set out in Appendix to Byles on Bills), by which, on affidavit of *personal service* (which must still be personal notwithstanding the new orders as to substituted and other service, *Pollock* v. *Campbell*, *infra*), a plaintiff can sign final judgment, and a defendant can only have leave to appear upon showing a defence upon the merits; the judgment may then, if the circumstances make it just so to do, be set aside. The Common Law

Bills of Exchange Act, 1845.

Order II.

Procedure Acts are incorporated with this Act. Personal service is still required in proceedings under this Act notwithstanding the provision for substituted service in Ord. IX. r. 6, *Pollock* v. *Campbell*, 34 L. T. N. S. 360, W. N. (1876) 20; and see Weekly Notes (1875) p. 248, where Quain, J., also pointed out that a plaintiff need not proceed under this Act, but may specially indorse the writ under Order III. r. 6, and proceed to sign judgment under Ord. XIV. r. 1.

Writ in Admiralty actions.

[7. Relates to the writ in Admiralty actions.]

Teste of writ.

8. Every writ of summons and also every other writ shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England.

Order III.

ORDER III.

Indorsements of Claim.

Indorsement of claim.

1. The indorsement of claim shall be made on every writ of summons before it is issued.

2. In the indorsement required by order II., rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. The plaintiff may by leave of the Court or judge amend such indorsement so as to extend it to any other cause of action or any additional remedy or relief (*a*).

Amendment of indorsement.

Amendment.

(*a*) *E.g.*, he may add a claim for an injunction or a receiver, see *Colebourne* v. *Colebourne*, L. R. 1 C. D. 690.

The writ will be amended on production of a brief indorsed by counsel and initialed by the registrar, *Mathias* v. *Mathias*, W. N. (1876) 214.

Form of indorsement.

3. The indorsement of claim may be to the effect of such of the forms in part II. of Appendix (A) (*b*) hereto as shall be applicable to the case, or if none be found applicable then such other similarly concise form as the nature of the case may require.

(*b*) See Appendix, *post*.

Where plaintiff or defendant is a

4. If the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, the

indorsement shall show, in manner appearing by the statement in Appendix (A) hereto, part II, sec. 8 (*c*), or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued. Order III. party in a representative capacity.

(*c*) See Appendix, *post*

[5 relates to probate actions only.]

6. "In all actions where the plaintiff seeks merely to recover a debt or "liquidated demand in money payable by the defendant, with or without "interest, arising upon a contract, express or implied, as, for instance, on a "bill of exchange, promissory note, cheque, or other simple contract debt, "&c., or on a bond or contract under seal for payment of a liquidated "amount of money, or on a statute where the sum sought to be recovered is "a fixed sum of money or in the nature of a debt, or on a guaranty, "whether under seal or not, where the claim against the principal is in "respect of such debt or liquidated demand, bill, cheque, or note, or on a "trust, the writ of summons may be specially indorsed with the particulars "of the amount sought to be recovered, after giving credit for any payment "or set-off." (See Appendix, *post.*) Special indorsement of liquidated demand.

7. "Wherever the plaintiff's claim is for a debt or liquidated demand "only, the indorsement, beside stating the nature of the claim, shall "state the amount claimed for debt, or in respect of such demand, and for "costs respectively, and shall further state, that upon payment thereof "within four days after service, or in case of a writ not for service within "the jurisdiction within the time allowed for appearance, further proceed-"ings will be stayed. Such statement may be in the form in Appendix (A) "hereto, pt. II., sect. 3. The defendant may, notwithstanding such pay-"ment,* have the costs taxed, and if more than one-sixth shall be disallowed, "the plaintiff's solicitor shall pay the costs of taxation." To state amount of debt and costs claimed.

* See 6 & 7 Vict. c. 73, p. 16, *ante.*

8. In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken (*d*), the writ of summons shall be indorsed with a claim that such account be taken. Claim that an account be taken.

(*d*) Ord. XV. provides for making an order for account, with usual directions, upon a writ thus indorsed. Ord. XV. Order for account.

ORDER IV. Order IV.

Indorsement of Address.

[Rules 1 and 2 only apply where the writ is issued out of the London office. (See rule 2A, p. 438. *infra.*)] Where writ is issued out of London office.

1. (*a*) The solicitor (*b*) of a plaintiff suing by a solicitor shall indorse upon every writ of summons and notice in Indorsement of address.

Order IV.

lieu of service of a writ of summons the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent (*c*) of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

Cons. Ord. III. rr. 2, 4. Service on solicitors.

(*a*) This rule is substantially identical with Cons. Ord. III. r. 2. If no address of the solicitor is given he may be served at his place of business (Cons. Ord. III. r. 4). The rule does not enable a defendant, where one plaintiff sues on behalf of others, to call for the address of their solicitors, *Leathley* v. *McAndrew*, W. N. (1875) 259 ; but as to partners, see Ord. VII. r. 2, *post*.

See *Wright* v. *King*, 9 Beav. 161 ; *Newton* v. *Thompson*, 16 Jur. 1008. Compare cases on substituted service, p. 456, *post*.

As to service on solicitors generally, see *Re Wisewold*, 16 Beav. 357 ; *Re Catlin*, 18 Beav. 508 ; *Re Dufaur*, 16 Beav. 113 ; *Re Thomson*, 20 Beav. 545 ; *Wilson* v. *Emmett*, 19 Beav. 233 ; *Ex parte Belton*, 25 Beav. 368 ; *Re Walton*, 4 K. & J. 78.

Absconding solicitors.

In one case, the Court, under peculiar circumstances, allowed service to be effected on the solicitor by placing it under the door of his chambers, *Re Templeman*, 20 Beav. 574. And where the solicitor in the cause had absconded, he was held to be rightly served with a notice of motion left at his unoccupied place of business, *Newton* v. *Thompson*, 22 L. J. Ch. 10.

Appearance by solicitor.

Plaintiffs should appear by one solicitor, *Peasells* v. *Peasells*, Johns. 58.

Cons. Ord. III. r. 1 provides as follows :—

Cons. Ord. III. r. 1.

Rule 1. Duties of solicitors.

1. *The solicitors of this Court in all cases where the parties sue or defend by solicitors, and the parties themselves in all cases where they sue or defend in person, shall perform all such duties as were formerly performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in relation to the matters hereinafter mentioned, viz. :—*

The making out writs.

The serving and being served with writs, notices, orders warrants, and other documents, proceedings, and written communications, in causes and matters depending in Court.

The signing of elections and agreements to proceed at law or in equity.

The signing of petitions of re-hearing and appeal.
The entering of appearances and consents with the registrar.
The signing of consents to petitions.
The tender and acceptance of costs.
The joining in commission and striking of commissioners' names.
The signing of notices by paupers.
And all other duties formerly performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in suits or matters in equity.

For rule 2, see note (*a*), *supra*.

Rule 2. Address.

3. *A party suing or defending by a solicitor shall not be at liberty to change his solicitor in any cause or matter without an order of the Court for that purpose, which may be obtained by motion or petition as of course, and until such order is obtained and served, and notice thereof given to the Clerk of Records and Writs, the former solicitor shall be considered the solicitor of the party.*

Cons. Ord. III. r. 3. Solicitor not to be changed without order.

The solicitor is generally not to be changed without an order (r. 3, *infra*), even when the firm has been dissolved, *Muttlebury* v. *Hayward*, 8 Jur. 1085 ; but there are these exceptions, viz. :—

Change of solicitor.

(1) Where money stands to the separate account of a party to an action he may petition for payment out by a new solicitor, *Waddilove* v. *Taylor*, 17 L. J. Ch. 384.

(2) Where the solicitor dies pending the action, *Whalley* v. *Whalley*, 22 L. J. Ch. 632.

If the solicitor of a party to the action dies, and the party neglects to appoint a new one, he should be served with a *subpœna* to name a solicitor, see *Gibson* v. *Ingo*, 2 Ph. 402 ; *Dean* v. *Lethbridge*, 26 Beav. 397.

Subpœna to name a new solicitor.

Where there was a special contract respecting the employment of a solicitor, and an order, as of course, to change solicitors was obtained, the special contract being suppressed, such order was discharged with costs, *Richards* v. *Scarborough Market Company*, 17 Beav. 83 ; *Jenkins* v. *Bryant*, 3 Drew. 70 ; and see *Topping* v. *Searson*, 2 H. & M. 205.

Special order to change solicitors.

(*b*) Where there has been a change of solicitors without order, service of notices, &c., upon the old solicitors is regular, *Wright* v. *King*, 9 Beav. 161 ; *Davidson* v. *Leslie*, *ibid*,. 104.

(*c*) See *Waldon* v. *Thompson*, L. R. 6 Eq. 7, as to agency for two solicitors in a suit.

Agency.

(*See rule* 2A, *infra, as to the application of the following rule.*)

2. A plaintiff suing in person shall indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if

Address of plaintiff suing in person where writ

Order IV.

Issues out of London office.

his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.

Application of rules 1 and 2.

2A. Notwithstanding anything contained in Order IV. of the rules of the Supreme Court, rules 1 and 2 of such order shall only apply where the writ of summons is issued out of the London office (*d*).

(*d*) The second part of this rule marked 2A, was added by r. 2 of Orders of Feb. 1876.

Cons. Ord. VI. r. 5.

Rule 2 is substantially identical with Cons. Ord. VI., r. 5, and if there is no indorsement of address of the party he may, by Cons. Ord. VI. r. 6, be personally served with writs, &c, or at his place of residence.

Address of plaintiff's solicitor or plaintiff when the writ is issued out of a district registry.

3 (*e*). In all cases where a writ of summons is issued out of a district registry the solicitor shall give on the writ the address of the plaintiff and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if each place be not within the district he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar; and where the solicitor issuing the writ is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Where the plaintiff sues in person, he shall give on the writ his place of residence and occupation, which shall, if his place of residence be within the district, be an address for service, and if such place be not within the district he shall add an address for service within the district, and, where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar.

Application of rule 3.

(*e*) This rule was substituted for the original rule by the 3rd of the rules of February, 1876. The original rule applied only to cases where the defendant had not the option of entering appearance in the London office.

ORDER V.

Issue of Writs of Summons.

1. *Place of Issue.*

Issue of writ out of registry office.

1. In any action other than a probate action, the plaintiff wherever resident may issue a writ of summons out of the registry of any district (*a*).

(*a*) The action must be assigned to a Court, and if in the Chancery Division to a judge (see r. 4, *infra*), though it is to be tried before the district registrar, see Ord. XXXV. r. 10.

Place for defendant's appearance.

2. In all cases where a defendant neither resides nor carries on business within the district out of the registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered at his option either at the district registry or the London office, or a statement to the like effect.

3. In all cases where a defendant resides or carries on business within the district, and a writ of summons is issued out of the district registry, there shall be a statement on the face of the writ of summons that the defendant do cause an appearance to be entered at the district registry, or to the like effect.

2. *Option to choose Division in certain Cases.*

Option to choose division and judge.

4. Subject to the power of transfer,* every person by whom any cause or matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognizance of the High Court of Admiralty if the said Act had not passed shall assign such cause or matter to any one of the divisions of the said High Court, including the Probate, Divorce, and Admiralty Division, as he may think fit, by marking the document by which the same is commenced with the name of the division, and giving notice† thereof to the proper officer (*b*) of the Court. If so marked for the Chancery Division the same shall be assigned to one of the judges of such division (*c*), by marking the

* Ord. LI.

† See r. 9, p. 448.

Order V.

same with the name of such of the said judges as the plaintiff or petitioner (subject to such power of transfer) (*d*) may think fit (*e*).

Record and Writ Clerks. Cons. Ord. I. 35, &c.

(*b*) The proper officers in chancery are the Record and Writ Clerks (Cons. Ord. VI. 1, *infra*), but as to district registry causes, see Ord. XIX. r. 29, *post*. The duties of the Record and Writ Clerks are set forth in Cons. Ord. I., r. 35, &c., as follows :—

Rule 35. Clerks of Records and Writs to perform duties formerly performed by six clerks, sworn clerks, &c., except as solicitors.

35. *The Clerks of Records and Writs shall have the care of all documents ordered to be deposited for safe custody, and shall also (besides other duties) perform all such duties as were performed by the six clerks, sworn clerks, or waiting clerks, as officers of the Court, in relation to the several matters hereinafter mentioned; that is to say,*

The filing, custody, copying, and amending of all bills, demurrers, pleas, answers, and other pleadings and records.

The entrance of appearances, consents, notes, and memorandums of service.

The certifying of appearances and proceedings.

The custody of exhibits deposited for inspecting and copying.

The attendance with records and exhibits on the judges of this Court, or at the assizes, or elsewhere.

* Obsolete, see note (*f*), p. 123.

*The inrolment of decrees and orders.**

And all such other duties as were performed by the six clerks, sworn clerks, or waiting clerks, as officers of the Court, in relation to suits and matters in equity, and not as attornies, solicitors, or agents of the parties in suits or matters in equity.

36. Erasures, obliterations, &c. (see now Additional Orders, August, 1865, as to printing).

Rule 37. Writs, how sealed.

37. *The Clerks of Records and Writs shall keep a seal, in such form and bearing such impression as the Lord Chancellor shall approve; and any person desirous of suing out any of the writs specified at the end of this rule may prepare the same in the present form, with such alterations and variations as circumstances may require,*

and may present such writ for sealing to the Clerks of Records and Writs; and such writs shall be open writs and it shall not be necessary for the Lord Chancellor to sign any such writ. And the Clerk of Records and Writs, upon any such writ being presented for sealing, shall ascertain whether such writ is correct in form, and whether the person presenting the same is, according to the course and practice of the Court, entitled to sue out the same, and in case it shall appear that such writ is correct in form, and that the person is entitled to sue out the same, such writ shall be forthwith sealed with such seal as aforesaid, and shall, when so sealed, have the same force and validity as such writ had when sealed with the great seal.

The writs above referred to in this rule are the following:—writ of assistance, writ of attachment, commission to assign a guardian, commission to examine witnesses, writ of distringas, writ of elegit, writ of fieri facias, writ of habeas corpus, writ of injunction, writ of ne exeat regno, writ of dower, commission of partition, commission to distinguish and divide lands, writ of sequestration, writ of subpœna, writ of venditioni exponas, writ of fieri facias de bonis ecclesiasticis, writ of sequestrari facias de bonis ecclesiasticis, and writ of inquiry of damages.

Rule 38. Security for costs.

38. *Where security of costs is directed to be given, such security shall be given to the Clerk of Records and Writs in whose division the cause or matter is.*

Rule 39. Pleas, answers, and affidavits before whom sworn.

39. *Pleas, answers, and affidavits may be sworn before any Clerk of Records and Writs, or before the Clerk of Inrolments in Chancery, as occasion may require.*

Rule 40. Acknowledgments for inrolling deeds.

40. *All acknowledgments required for the purposes of inrolling any deed or other document in Chancery may be made before the Clerk of Inrolments in Chancery, or before any Clerk of Records and Writs, as occasion may require.*

Rule 41. Inrolments to be transmitted to the Public Record Office.

41. *The records of all deeds and recognisances inrolled shall be sent by the Clerk of the Inrolments to the Public Record Office, Rolls Yard, within two years from the time of the inrolment thereof.*

Order V. —— Cons. Ord. I.

By Cons. Ord. XLII. rr. 12—14, recognisances may not be inrolled after six months from acknowledgment: they are to be given to the M. R. and Senior Vice-Chancellor, and the Clerk of Inrolments is to attend to vacate them.

Rule 42. Records not to be removed.

42. *No person shall carry away any record * from the Public Record Office, Rolls Yard, to any other place, without the direction of the Master of the Rolls, nor take out of the office of the Clerks of Records and Writs any record or document filed there, except by the direction of the Court.*

* See Add. Ord. Aug. 1875, Ord. V. r. 6, *post*, as to office copies.

Rule 43. Deposit to answer fees.

43. *Any Clerk of Records and Writs, being required to attend with any record or document at any assizes or at any Court or place out of the Court of Chancery or the offices thereof, shall be entitled to require that the solicitor or party desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges, and expenses in respect of such attendance, and undertake to pay any further just fees, charges, and expenses which may not be fully answered by such deposit.*

Rule 44. Filing and transmitting of certificates, petitions, admissions of evidence, submissions to arbitration, and awards made orders of Court.

Office copies to be delivered out within 48 hours.

44. *All certificates of the chief clerk of a judge (after the same shall have been signed by the judge in cases where his signature is required), and all petitions, and written admissions of evidence whereon any order is founded, and all submissions to arbitration and awards made orders of this Court, shall be transmitted to and left at the Report Office, to be there filed or preserved under the direction of the Clerks of Records and Writs. And all office copies thereof, or of any part thereof, that may be required, shall be ready to be delivered to the party requiring the same, within forty-eight hours after the same shall have been bespoken.*

Rule 45. Date of filing proceedings.

45. *Upon every pleading or other proceeding which is filed under the direction of the Clerks of Records and Writs, the date of filing the same shall be printed or written.*

Rule 46. Indexes to reports, &c., to be kept and to be accessible.

46. *Proper indexes or calendars to the files or bundles of the reports, certificates, exceptions to reports, petitions, admissions of evidence, and all other documents filed at the Report Office, shall be kept by the Clerks of Records and Writs, so that the same may be conveniently referred to*

when required. And such indexes or calendars and documents shall, at all times during office hours, be accessible to the public, on payment of the usual fee.

Rule 47. Entry of time of delivering certificate.

47. *The Clerks of Records and Writs shall also enter in the books kept by them for that purpose, the time when any certificate is delivered to them to be filed, with the name of the cause and the date of the certificate. And the like entry shall be made of the time of delivery of every other document filed at the Report Office. And such books shall, at all times during office hours, be accessible to the public, on payment of the usual fee.*

Rule 48. Reference to record to be written or stamped on documents.

48. *Every decree, order, report, certificate, petition, or document, made, presented, or used in any cause in this Court, shall be distinguished by having plainly written or stamped on the first page of such decree, order, report, certificate, petition, or document, the year, the letter, and the number by which the cause is distinguished in the cause books kept by the Clerks of Records and Writs.*

Rule 49. Dates of decrees, &c., be entered in cause books.

49. *The Clerks of Records and Writs shall, in addition to the entries formerly made by them in their respective cause books, enter therein respectively the date of every decree, order, report, and certificate, which shall be made in each cause.*

Rule 50. References to dates and folios of registrar's book.

50. *The entry of every such decree and order in such cause books shall contain a reference to the date and folio of the registrar's book in which such decree or order shall have been entered.*

[By r. 51 the last three rules were not to apply to causes commenced before 1852.]

[By r. 52 applications might be made to the Exchequer for documents in old Exchequer causes.]

Rule 53. Certificate of proceedings in a cause or matter.

53. *For the purpose of enabling all persons to obtain precise information as to the state of any cause or matter, and to take the means of preventing improper delay in the progress thereof, any Clerk of Records or Writs shall, at the request of any person whether a party or not in the cause or matter inquired after, but on payment of the usual fee, give a certificate specifying therein the dates and general description of the several proceedings which have been*

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taken in such cause or matter in the Record and Writ Clerks' Office.

Cons. Ord. VI.

(c) As to Chancery causes, Cons. Ord. VI. made the following provisions for setting down causes :—

Cons. Ord. VI. Rule 1. Marking writs in Chancery division. Entry of causes.

1. *Every original bill to be filed in the High Court of Chancery shall (at the option of the plaintiff) be distinctly marked, at or near the top or upper part thereof either with the words "Lord Chancellor," or with the words "Master of the Rolls;" and if with the words "Lord Chancellor," then also with the name of one of the Vice-Chancellors for the time being, at the option of the plaintiff. And the Record and Writ Clerks shall, in the books and indexes in which the same shall be entered, add to the entry thereof such distinguishing words or mark as may make it appear from such entry whether the bill is marked with the words "Lord Chancellor," or with the words "Master of the Rolls," and if with the words "Lord Chancellor," then for which of the Vice-Chancellors the same is marked. And the cause (unless removed by some special order of the Lord Chancellor or Lords Justices)* shall accordingly be attached to the Court of the Master of the Rolls, or to the Court of such Vice-Chancellor, as the case may be. And the Record and Writ Clerks shall not file any original bill which shall not be marked in the manner hereinbefore directed.*

* See now Ord. LI. r. 1.

Cons. Ord. VI. r. 2. Record and Writ Clerk's certificate.

2. *The Record and Writs Clerk to whom it belongs to give or sign the certificate that a cause is ready for hearing, shall, upon being applied to for such certificate, see that the same certificate is marked, or cause the same to be marked, with the designation of the judge to whose Court the cause is attached.*

Cons. Ord. VI. r. 3. Causes not to be set down unless certificate be marked.

3. *The registrars shall not set down to be heard any cause in which the certificate of the cause being ready for hearing shall not be marked in the manner hereinbefore directed.*

Cons. Ord. VI. r. 6. Notices of motions and petitions not

6. *Every notice of motion not in any cause, and every petition not in any cause, and every petition or motion paper under the stat.* 13 & 14 *Vict. c.* 35, *s.* 19, *shall be marked at or near the top or upper part thereof, in the*

same manner as a bill is now marked, with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls; and every order made thereon shall be marked in the same manner as the said notice of motion, petition or motion paper; and the matter in which such order is made shall thenceforth be considered as attached to the Court of the judge whose name shall be so marked upon such order in like manner and for the like purpose as causes are attached to such Court, but shall be subject to be transferred from such Court in the same manner as causes are so transferred; and the provisions of the 5th and 11th rules of this order shall apply to every matter so attached.

Cons. Ord. VI. in any cause, and petitions and motion papers, under stat. 13 & 14 Vict. c. 35, s. 19, and orders thereon, are to be marked in same manner as bill.

**7. Upon any Vice-Chancellor for the time being ceasing to hold his office, any cause or matter which shall then be attached to the Court of such Vice-Chancellor shall, unless removed by any special order of the Lord Chancellor or Lords Justices, thenceforth be attached to the Court of his successor, as Vice-Chancellor for the time being.*

Cons. Ord. VI. r. 7. Vice-Chancellor ceasing to hold his office.

8. The registrars shall keep distinct lists of the causes and other matters set down to be heard before each judge.

Cons. Ord. VI. r. 8.

9. All applications for orders of course to be obtained on petition or motion shall and may be made in the same manner, in all respects, as if the above rules of this order had not been made.

Cons. Ord. VI. r. 9. ORDERS OF COURSE. (See p. 119, *ante*.)

10. Applications to discharge, reverse, or alter any order made on motion or petition of course by the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, shall be made to the judge to whom special applications in the cause or matter in which such order is made ought to be made.

Cons. Ord. VI. r. 10. Applications to discharge, reverse, or alter orders of course.

See *Wright* v. *Irving*, 10 Sim. 625; *St. Victor* v. *Devereux*, 6 Beav. 534; *Hooper* v. *Paver*, *ibid.*, 173; *Arnold* v. *Arnold*, 9 Beav. 206; *Cooper* v. *Knox*, 15 Beav. 102; *Yearsley* v. *Yearsley*, 19 Beav. 1; *Re Bell*, 2 H. & M. 501: where there was suppression of material facts the judge who made the order of course will discharge it, *Marquis of Hertford* v. *Suisse*, 7 Beav. 160.

(*d*) Where a plaintiff after proceedings have been instituted in one branch of the Court, institutes other proceedings in another branch in respect of the same property or subject matter (see *Curlewis* v. *Whidborne*, 10 W. R. 261; *Merchant Banking Company* v. *Maud*, 15 W. R. 886; *Salter* v. *Tildesley*, 13 W. R. 376), a transfer will be ordered, and the plaintiff in the second cause may have (if he was aware of the former proceedings) to pay the costs of the application for the transfer, *Orrell* v.

Transfer of one of two actions in respect of same subject-matter in different

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branches of the Court.

Busch, L. R. 5 Ch. 467 ; *Lucas* v. *Siggers*, L. R. 6 Ch. 517 ; see, however, *Lyall* v. *Weldhen*, L. R. 9 Ch. 287 ; where *Sayers* v. *Corrie*, L. R. 9 Ch. 52, is referred to in a note. And as to staying such proceedings in the Lord Mayor's Court, see *Nothard* v. *Proctor*, 45, L. J. Ch. Div. 302.

If two decrees have been made in different branches of the Court the transfer will in the absence of special circumstances be made to the branch in which the fullest and most perfect decree has been made, *Littlewood* v. *Collins*, 11 W. R. 387, and see *Corser* v. *Jones*, 14 W. R. 704.

Stay of one of the two actions.

If the suits are identical, the proceedings in one may be stayed and the cause carried on in the other, *Golder* v. *Golder*, 9 Hare, 276 ; *Underwood* v. *Jee*, 1 M. & G. 276 ; *Portarlington* v. *Damer*, 2 Phill. 262 ; *Jackson* v. *Leaf*, 1 J. & W. 229 ; and the same rule applies to petitions, *Re Browse*, 14 W. R. 298 ; and if the second proceedings were unnecessary they are stayed *Whittington* v. *Edwards*, 3 De G. & J. 243 ; see *Re Chaplin*, 3 N. R. 289 ; *Harris* v. *Lightfoot*, 10 W. R. 31 ; *Sayers* v. *Corrie*, 43 L. J. Ch. N. S. 337.

Consolidation of action, Ord. LI. 4.

Even where the objects of the two suits have not been precisely similar but one would effect more than the other, the Court has amalgamated them, see *Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439, and see Ord. LI. r. 4 as to consolidation of actions.

Or of action and summons.

The rule applied equally where one suit for administration had been instituted by bill and another by summons. The proceedings instituted by bill were stayed, *if the same decree could be made on the summons as on the bill* (see *Rump* v. *Greenhill*, 20 Beav. 512), *Ritchie* v. *Humberstone*, 22 L. J. Ch. 1006 ; *Penney* v. *Francis*, 9 W. R. 8 ; *Thompson* v. *Thompson*, 11 W. R. 797 ; *Whittington* v. *Edwards*, 3 De G. & J. 243 ; and see *Pigott* v. *Young*, 7 W. R. 235, where a suit instituted by claim was adjourned into chambers.

Duchy Court.

As to staying proceedings in the Duchy Court of Lancaster, see *Wynne* v. *Hughes*, 26 Beav. 377, *Bradley* v. *Stelfox*, 1 N. R. 221.

Costs of plaintiff in stayed action.

If the costs of the plaintiff whose action is stayed are made costs in the other action such costs are not given a priority, but will be paid in due order of administration only, *Re Clark*, L. R. 4 Ch. 412.

Conduct of proceedings.

The general rule adopted has been to carry on the cause in which a decree was first made ; but this rule was subject to exceptions, *e.g.*, where the plaintiff in the later suit has a better right to the carriage of the suit, *Virtue* v. *Miller*, 19 W. R. 406. Thus, a mother instituting a suit, has been preferred to other relations, though they had priority, *Harris* v. *Lightfoot*, 10 W. R. 31, and a person beneficially interested to a creditor, *Penney* v. *Francis*, 9 W. R. 8 ; *Kelk* v. *Arthur*, 16 Jur. 605 ; without respect to priority of decree.

When priority unfairly obtained,

or second suit was unnecessary.

So where priority has been unfairly obtained (*Harris* v. *Gandy*, 1 D. F. J. 13 ; *Belcher* v. *Belcher*, 2 Dr. & Sm. 444, 13 W. R. 913 ; *Frost* v. *Ward* 2 D. J. S. 70 ; *Rhodes* v. *Barret*, L. R. 12 Eq. 479 ; see *Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439), the Court has stayed the proceedings in the second cause and given the conduct to the plaintiff in the first cause—*e.g.*, where an administration suit instituted by bill has been pending, and a party has without good reason attempted to gain priority by taking out a summons, *White* v. *Lyon*, 4 N. R. 221 ; and see remarks by V.-C. Malins, in *Tulloch* v. *Tulloch*, L. R. 3 Eq. 574, 576 ; *Furze* v. *Hennet*, 2 De G. & J. 125 ; *Harris* v. *Gandy*, 1 D. F. J. 13 ; and compare the cases on last page, as to giving the conduct of the cause to the plaintiff in the second suit, when priority has been unfairly obtained ; and see *Scaffold* v. *Hampton*, W. N. (1873) 218.

But see *Piffard* v. *Vanrenen*, 13 W. R. 425, where the bill charged an executor with fraud, and the executor, after appearing to the bill, took out an administration summons and obtained the usual order, and V.-C. Stuart refused to discharge the order, and said that the accounts might be taken and the residue ascertained, subject to the reservation of the question raised by the bill.

See notes to Ord. LI. r. 1., as to the practice of applying for a transfer, and Ord. LI. r. 4 as to consolidation of action.

Action attached to a court.

(*e*) An action or matter being set down before a judge is attached to his Court, see Judicature Act, 1875, s. 11 (1) (p. 374, *ante*), superseding Cons. Ord. VI. rr. 4, 5 ; but in the following cases it has been held that appli-

Cons. Ord. VI. rr. 4, 5.

cations need not be made to the judge to whose court the *matter* was attached. Order V.

What applications may be made out of Court to which the matter is attached.

Where an order was made for new trustees of a charity, it was held not to be necessary that all subsequent applications for appointment of new trustees should be made to the judge who had made the first order, *Re Watts' Charities*, 30 Beav. 404 ; and the same was held were the applications were for the payment of dividends on sums paid into Court in the matter of a private Act of Parliament, *Re Bilston Curacy*, 10 W. R. 516 ; reluctantly followed by V.-C. Wood in *Re Hayter*, *ibid.*, 557 ; but see *contra*, *Re Browse*, 14 W. R. 298 ; *Re Alexander Printing Ink Company*, 16 W. R. 456.

3. *Generally.*

Writ of summons to be printed.

5. Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed (*f*).

(*f*) See Ord. LVI. r. 2.

Sealed.

6. Every writ of summons shall be sealed by the proper officer,* and shall thereupon be deemed to be issued.

* See note (*b*), p. 440, *supra*.

Left at Record and Writ Office.

7. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy written or printed, or partly written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person.

Filed in the cause book.

8. The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the cause book, which is to be kept in the manner in which cause books have heretofore been kept by the Clerks of Records and Writs in the Court of Chancery, and the action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned cause books.

And when such action shall be commenced in a district registry, it shall be further distinguished by the name of such registry (*g*).

(*g*) This clause was added by r. 3 of June, 1876, *post*.

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Notice to proper officer. * See note (*b*), p. 440, *supra.*

9. Notice to the proper officer* of the assignment of an action to any division of the Court under section 11 of the Supreme Court of Judicature Act, 1875, or under rule 4 of this order, shall be sufficiently given by leaving with him the copy of the writ of summons.

4. *In Particular Actions.*

[Rule 10 relates to the issue of a writ of summons in Probate actions.]

[Rules 11, 12 relate to Admiralty actions in rem, and were altered by rule 3 of the rules of Dec. 1875, and again by rule 4 of the rules of Feb. 1876.]

Order VI.

ORDER VI.

Concurrent Writs.

Issue of concurrent writs.

1. The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ (*a*) or writs, each writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer:* Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.

* See note (*b*), p. 440, *supra.*

(*a*) See 15 & 16 Vict. c. 76, s. 9 (Chitty's Statutes III., 722).

Writs for service within and without jurisdiction may be concurrent.

2. A writ for service within the jurisdiction may be issued (*b*) and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction (*c*).

(*b*) See Ord. V., r. 6, p. 447, *supra.*
(*c*) See 15 & 16 Vict. c. 76, s. 22 (Chitty's Statutes III., 725).

ORDER VII.

Order VII.

Disclosure by Solicitors and Plaintiffs.

Solicitor on demand to declare whether writ issued by his authority.

1. Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge (*a*).

(*a*) See 15 & 16 Vict. c. 76, s. 7 (Chitty's Statutes, p. 720); and as to written authority of next friends and relators, see 15 & 16 Vict. c. 86, s. 11 (p. 174, *ante*).

Partners suing on demand to name persons constituting the firm.

2. When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant (*b*), declare forthwith the names and places of residence of all the persons constituting the firm. And if the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm (*c*).

(*b*) The same right is given to any party to an action, Ord. XVI. 10.

(*c*) See *post*, Ord. IX. r. 6; Ord. XVI. r. 10.

ORDER VIII.

Order VIII.

Renewal of Writ.

Renewal of writ of summons to

Order VIII.

save the statutes of limitation.

including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a judge, or the district registrar, for leave to renew the writ (*a*), and the judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer,* upon delivery to him by the plaintiff or his solicitor of a memorandum in form No. 5 in Appendix (A), Part I. (*b*); and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

* See note p. 8.

(*a*) See 15 & 16 Vict. c. 76, s. 11; Chitty's Statutes, III., 722. The Court cannot order a copy of a lost writ to be sealed for renewal, *Davis* v. *Garland*, 45 L. J. 1 Q. B. Div. 137; 33 L. T. N. S. 727.

(*b*) See Appendix of Forms, *post*.

Production of renewed writ.

2. The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes (*c*).

(*c*) See 15 & 16 Vict. c. 76, s. 13; Chitty, 722.

ORDER IX.

Order IX.

Service of Writ of Summons.

1. *Mode of Service.*

Agreement to accept service.

1. No service of writ shall be required when the defendant, by his solicitor, agrees (*a*) to accept service, and enters an appearance.

(*a*) A solicitor not entering an appearance in pursuance of his written undertaking is liable to attachment, Ord. XII., r. 14, *post*, p. 465.

Service personal or substituted.

2. When service is required the writ shall, wherever it is practicable, be served (*b*) in the manner in which personal service is now made (*c*), but if it be made to appear to the Court or to a judge (*d*) that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge (*d*) may make such order for substituted (*e*) or other service, or for the substitution of notice for service (*f*) as may seem just.

(*b*) A notice of motion may be served with the writ. See Ord. LIII., r. 8.

Service of notice of motion with writ.

(*c*) Personal service is still *necessary* under the Bills of Exchange Act, see p. 433, 4, *ante*.

Cons. Ord. X., r. 1, provided for personal service as follows :

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Personal service.

1. *Service of every copy of a bill shall be effected by serving such copy personally, or by leaving the same with a servant of the defendant or some member of his family, at his dwelling-house or usual place of abode, unless the Court directs some other mode of service.*

Upon which rule the following cases were decided :

Service by post.

Service by a letter which the defendant admitted he had received, was held insufficient, *Gathercole* v. *Wilkinson*, 1 De G. & Sm. 681 ; but see contra, *Burton* v. *Shaw*, 10 L. T. N. S. 292 ; and see note (*f*), *infra*, as to notice by post.

At place of business.

Service at the chambers of a barrister resident out of London, and having little or no business, was insufficient (—— v. *Shaw*, cited in Hinde's Ch. Pr., p. 92). So service on a solicitor at his office was insufficient, unless under a special order (*Young* v. *Goodson*, 2 Russ. 255). See note (*f*), *infra*, as to notice at place of business.

Member of family.

The member of the family on whom service is effected must be an inmate of the house (*Edgson* v. *Edgson*, 3 De G. & S. 629).

Peers, M.P.'s, &c.

Service on a peer, even though he be abroad, is properly effected by leaving the bill at his town-house (*Thomas* v. *Earl of Jersey*, 2 M. & K. 398 ; and see *Attorney-General* v. *Earl of Stamford*, 2 Dick. 744, there cited ; and *Davidson* v. *Marchioness of Hastings*, 2 Keen, 509). Peers, whether

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Irish or English (*Robinson* v. *Lord Rokeby*, 8 Ves. 601), are entitled to letters missive. As to members of the House of Commons, see *East India Company* v. *Sir Thomas Rumbold*, Hinde, 91.

Prisoner.

Service on the deputy-governor of a gaol, when a defendant was prisoner, was held good service, *Newenham* v. *Pemberton*, 2 Coll. 54.

District registrar.

(*d*) In *Meek* v. *Michaelsen*, W. N. (1876) 111, it was intimated but not decided that in this rule these words include a district registrar.

(*e*) See Ord. X., *post*.

Substituted service.

(*f*) In Cons. Ord. XXXV. r. 18 the expression is "notice by advertisement, or otherwise, in lieu of service."

Notice in lieu of service at place of business and by post.

Ord. XI. r. 5 provides that notice in lieu of service shall be given in the manner in which writs of summons are served.

Notice has been allowed to be given by leaving the writ at the place of residence and place of business of a defendant, and by sending notice by post, *Cope* v. *Brewer*, 24 W. R. 40 ; by leaving a copy at defendant's lodgings and place of business, *Cook* v. *Dey*, L. R. 2 C. D. 218; and see *Crane* v. *Jullion*, L. R. 2 Ch. Div. 220, where service of the writ in an action to recover possession of leasehold houses against an absconding defendant, who had given the tenants notice to pay their rents to him, was directed to be effected by leaving a copy of the writ at each of the houses and by advertising in the "London Gazette" and the "Times."

Time for appearance.

The ordinary eight days' time *for appearance* runs from service of the copy of the writ and issue of adverisement, *ibid.*, and compare *Re Williams*, L. R. 8 Ch. 690 ; *Ex parte Chatteris*, L. R. 10 Ch. 227 ; *Raphael* v. *Ongley*, 34 L. T. N. S. 124.

Form of notice.

In a recent case V.-C. Hall suggested that an order to give notice of a writ in lieu of service in the case of an absconding defendant might be made to include leave to give notice that judgment would be moved for in due course, *Cook* v. *Dey*, W. N. (1876) 122 ; as to sending notice by post, see *Cope* v. *Brewer*, 24 W. R. 40, and see cases in note (*c*) *supra*, as to service by post and at place of business.

Notice in lieu of service allowed when defendant is *absconding*.

From the case of *Cook* v. *Dey*, L. R. 2 C. D. 218, it appears that notice in lieu of service is allowed where a defendant is absconding and not to be found (see *Harrison* v. *Stewardson* 2 Hare, 530 ; *Hele* v. *Ogle*, *ibid.*, 623 ; *Zu'ueta* v. *Vincnt*, 15 Beav. 272 ; *Graver* v. *Temple*, 9 Sim. 523 ; *Barton* v. *Whitcombe*, 16 Beav. 205 ; *Cope* v. *Russell*, 2 Ph. 404.

In order to treat a defendant as an an absconding defendant under the old practice it was held necessary to show that the plaintiff had made inquiries at places and of persons where there was reasonable probability that the defendant would be heard of (*Anstey* v. *Hobson*, 2 W. R. 46 ; *Harrison* v. *Stewardson*, 2 Hare, 530). Thus, where the plaintiff showed that the defendant was in Australia, and that communications had been unsuccessfully attempted to be made with him and through his wife, who was in England, and notice of the application had been served on the solicitor who had put in an appearance for him, this was held sufficient for the purpose of proceeding to take a bill pro confesso against him, *Robson* v. *Earl of Devon*, 2 W. R. 485.

Analogous practice under Consolidated Orders.

See further as to the practice of giving notice by advertisement, *Hyde* v. *Large*, L. R. 19 Eq. 48 ; and as to errors in the advertisements, *Jones* v. *Brandon*, 3 Jur. N. S. 1146 ; *Shepherd* v. *Stone*, W. N. (1868) 170.

The following rules of the Cons. Ords. provided for giving notice by advertisement to an absconding defendant.

Cons. Ord. X. r. 6.

Cons. Ord. X. r. 6, provided that—

Rule 6. Appearance may be entered by plaintiff for absconding defendant.

6. Where the Court is satisfied by sufficient evidence that any defendant has been within the jurisdiction of the Court at some time not more than two years before the bill was filed, and that such defendant is beyond the seas, or that, upon inquiry at his usual place of abode (if

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he had any), or at any other place or places where at the time when the bill was filed he might probably have been met with, he could not be found so as to be served with a copy of the bill, under the stat. 15 & 16 *Vict. c.* 86. *s.* 3, *and that in either case there is just ground to believe that such defendant has gone out of the realm or otherwise absconded to avoid being served with such copy of the bill or with other process, the Court may order that such defendant do appear at a certain day to be named in the order; and that a copy of such order, together with a notice to the effect set forth at the end of this rule, may within fourteen days after such order made, be inserted in the "London Gazette," and be otherwise published as the Court shall direct. And where the defendant does not appear within the time limited by such order, or within such further time as the Court may appoint, there, on proof made of such publication of the said order, the Court may order an appearance to be entered for the defendant on the application of the plaintiff.*

And Cons. Ord. XXII. r. 4, provided that—

Cons. Ord. XXII. r. 4. Where appearance entered for him notice to be inserted in "Gazette."

4. *Where any defendant who, under the 2nd rule of this order, may be deemed to have absconded to avoid or to have refused to obey the process of the Court, has had an appearance entered for him under the 4th, 6th, or 7th rule of Order X., and does not afterwards appear in person, or by his own solicitor, the plaintiff may cause to be inserted in the "London Gazette" a notice that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the "London Gazette"), the Court will be moved that the bill may be taken* pro confesso *against such defendant; and the plaintiff must, upon the hearing of such motion, satisfy the Court that such defendant ought, under the provisions of the 2nd rule of this order, to be deemed to have absconded to avoid or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the "London Gazette" at least once in every entire week reckoned from Sunday morning to Saturday evening which shall have elapsed between the*

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time of the first insertion thereof and the time for which the said notice is given; and the Court if so satisfied, and if an answer has not been filed, may, if it so think fit, order the bill to be taken pro confesso *against such defendant, either immediately, or at such time or upon such further notice as under the circumstances of the case the Court may think proper.*

2. On particular Defendants.

Service on married women;

3. When husband and wife are both defendants to the action, service on the husband shall be deemed good service on the wife (*g*), but the Court or a judge may order that the wife shall be served with or without service on the husband.

on husband;

(*g*) When the husband could not be found, service by advertisement was allowed, *Whitby* v. *Honeywell*, 24 W. R. 851.

Before the above rule service on the husband (even though a prisoner for debt at the time), was held good service on the wife (*Holcombe* v. *Trotter*, 9 Jur. 637; *Gee* v. *Cottle*, 3 M. & Cr. 180). *Secus*, if the wife was deserted by or voluntary living apart from him, *Holcombe* v. *Trotter*, *ubi sup.*; *Thomas* v. *Selby*, 9 Beav. 194; *Steele* v. *Plomer*, 1 M. & G. 83; *Hope* v. *Carnegie*, L. R. 7 Eq. 254; *Dubois* v. *Hole*, 2 Vern. 713 (where the demand was against the wife's separate estate).

on infant;

4. When an infant is a defendant to the action, service on his or her father or guardian, or if none, then upon the person with whom the infant resides or under whose care he or she is (*h*), shall, unless the Court or judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made or to be made on the infant shall be deemed good service.

on person having care of infant;

(*h*) In *Christie* v. *Cameron*, 4 W. R. 589, service on the rector of the college of which an infant was an under-graduate was held sufficient, the plaintiff being unable to discover where the defendant's father lived. So, service on an infant's mother, (*Smith* v. *Marshall*, 2 Atk. 70), or step-father (*Thompson* v. *Jones*, 8 Ves. 141), may be allowed.

on lunatic or person of unsound mind;

5. When a lunatic (*i*) or person of unsound mind not so found by inquisition (*k*) is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on such defendant.

(*i*) Before this rule the Court refused to grant leave to substitute service on the medical officer of an asylum, where a lunatic defendant was confined (*Morgan* v. *Jones*, 4 W. R. 381) ; *Sheldrake* v. *Elliston*, 2 L. T. N. S. 48 ; but in *Raine* v. *Wilson*, L. R. 16 Eq. 576, such service was allowed.

(*k*) See *Re Crabtree*, L. R. 10 Ch. 201.

On committee or person having care, &c.

3. *On Partners and other Bodies.*

Service on partners.

6. Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there ; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm.

Rule 4 of June 1876, on manager of business of a firm.

6A. Where (*l*) one person, carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm named (*m*), the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there ; and, subject to any of the rules of the Supreme Court, such service shall be deemed good service on the person so sued.

On one partner.

(*l*) The second clause of this rule (marked 6A), was added by r. 4 of the rules of June, 1876.

See further as to service on one member of a firm, *Young* v. *Goodson*, 2 Russ. 255 ; *Carrington* v. *Cantillon*, Bunbury, 107 ; *Coles* v. *Gurney*, 1 Mad. 187 ; *Kinder* v. *Forbes*, 2 Beav. 503 ; *Leese* v. *Martin*, L. R. 13 Eq. 77.

(*m*) This is allowed by Ord. XVI. r. 10a, *post*.

On corporation or society.

7. Whenever, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation (*n*), or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided.

Scotch company.

(*n*) Service on a Scotch company was allowed at their London office when they had large property in England, *Maclaren* v. *Stainton*, 16 Beav. 279.

Foreign corporation.

A writ of summons was allowed to issue against a foreign corporation,

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Westman v. *Snickarefabrik*, L. R. 1 Exch. D. 237, 45 L. J. Ex. 327; see *Newby* v. *Von Oppen*, L. R. 7 Q. B. 293.

4. *In particular Actions.*

Service in an action to recover land.

8. Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*o*).

Foreclosure.

(*o*) See 15 & 16 Vict. c. 76, s. 170; Chitty's Statutes, III., p. 749. A foreclosure action is not an action to recover land within the rules, *Tarrell* v. *Slate Company*, W. N. (1876) 219.

Service in Admiralty actions.

[Rules 9—12 relate to Admiralty actions in rem.]

Generally.

Indorsement of date of service.

13. The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default (*p*); and every affidavit of service of such writ shall mention the day on which such indorsement was made. (*q*)

(*p*) This indorsement is not required where service is not personal, *Dymond* v. *Croft*, 24 W. R. 842, 34 L. T. N. S. 786.

(*q*) See Cons. Ord. X. r. 8, p. 469, *post*.

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ORDER X.

Substituted Service.

Substituted service on what grounds.

*Ord. IX. r. 2.

1. Every application to the Court or a judge, under Order IX., rule 2, for an order for substituted or other service, or for the substitution of notice for service,* shall be supported by an affidavit setting forth the grounds upon which the application is made (*a*).

Cons. Ord. X. r. 2

(*a*) Cons. Ord. X. r. 2, provided as to substituted service as follows:

Old practice as to substituted service.

2. *The Court may direct substituted service of a copy of a bill to be served under the stat.* 15 *&* 16 *Vict. c.* 86, *in cases in which, according to the practice of the*

Court, existing at the time of the passing of that statute, substituted service of a subpœna to appear to and answer a bill might have been directed.

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On which the following cases were decided.

Application for substituted service.

Substituted service was held good, though no order had been previously obtained, in *Re Paragon and Spero Mining Company*, 10 W. R. 76; *Martin* v. *Pycroft*, 5 W. R. 464.

The application was by *ex parte* motion, *Danford* v. *Cameron*, 8 Hare, 329; *Read* v. *Barton*, 28 L. T. 36; and it should be shown that every effort has been made to effect personal service, *Firth* v. *Bush*, 11 W. R. 611; see *Hope* v. *Carnegie*, 1 L. R. Eq. 126.

Where defendant resides abroad.

Substituted service was allowed where the defendant was not absconding, but residing permanently abroad, *Griffiths* v. *Cowper*, 2 D. F. J. 208; see *Deanes* v. *Kitchin*, L. R. 13 Eq. 461, where in a suit for administration of realty and personalty, the heir had been served, but his interest in the suit having ceased a motion for decree was allowed to be served on the administratrix in substitution for the heir, who had gone abroad.

Service will be substituted on an *agent*.

Before the Court will direct substituted service, it must be proved that the person on whom it is sought to effect such service is the agent of the defendant for a purpose closely connected with the suit, *Bones* v. *Anderier*, 2 W. R. 609, and that there is *reasonable ground to believe that the service will come to the party's own knowledge*, *Hope* v. *Hope*, 19 Beav. 237; 4 D. M. G. 328; *Hunt* v. *Lever*, 5 Ves. 147; *Heald* v. *Hay*, 9 W. R. 369; *Dicker* v. *Clarke*, 11 W. R. 635.

On solicitor or attorney in matters connected with the action.

A solicitor who has acted for the defendant in transactions connected with the subject-matter of the action is a sufficient agent for the purpose of substituting service, *Hope* v. *Carnegie*, 1 L. R. Eq. 126; *Sergison* v. *Beavan*, 9 Hare, App. xxix. (note); *Hurst* v. *Hurst*, 1 De G. & Sm. 694; *Hawkins* v. *Bennett*, 1 Gif. 215; *Brooker* v. *Smith*, 4 L. T. N. S. 545; *Hope* v. *Hope*, 19 Beav. 237; 4 D. M. G. 328; *Scott* v. *Wheeler*, 13 Beav. 239; *Norton* v. *Hepworth*, 1 M. & G. 54; and substituted service on the solicitor was ordered, though he objected to accept it, *Governors of Grey Coat Hospital* v. *Westminster, &c., Commissioners*, 4 Jur. N. S. 449. The solicitor in a former suit was held the client's agent for the purpose of substituted service in a fresh suit, *Ridsdale-Allanlee* v. *G. W. R. Coy.*, W. N. (1869) 269; but see *Hurst* v. *Hurst*, 1 De G. & Sm. 694; *Waterton* v. *Croft*, 5 Sim. 502.

On a former solicitor.

Not on person merely in communication.

A solicitor who had only written for a copy of the bill was held not to be sufficiently an agent for the purpose, *Asiatic Banking Company* v. *Anderson*, 13 L. T. N. S. 272; nor is the fact of a person being in communication with the absent party sufficient, *Watts* v. *Hughes*, 8 W. R. 292.

On a steward and particular agent.

Substituted service on stewards and agents of persons abroad was authorised by 4 & 5 Wm. 4, c. 82, sect. 1, *Cox* v. *Bannister*, 8 W. R. 206; *Carwardine* v. *Wisklade*, 15 Jur. 913; and generally substituted service upon an agent in respect of property the subject of the suit, is allowed, *Hobhouse* v. *Courtney*, 12 Sim. 140; *Morrit* v. *Walton*, 2 W. R. 643; *Cooper* v. *Wood*, 5 Beav. 391; *Murray* v. *Vipart*, 1 Ph. 521; *Weymouth* v. *Lambert*, 3 Beav. 333; *Jackson* v. *Shanks*, 13 W. R. 287; and see reporter's note to *Rickcord* v. *Nedriff*, 2 Mer. 458. *Secus*, where the agency was not proved, *Webb* v. *Salmon*, 3 Hare, 251. Substituted service on a general agent was allowed in *Jones* v. *Cargill*, 11 L. T. N. S. 566: on a solicitor with general power of attorney, in *Forster* v. *Menzies*, 16 Beav. 568, see *Barker* v. *Piele*, 11 W. R. 658; on the master of a vessel for the owners, *Hart* v. *Herwig*, 21 W. R. 663, L. R. 8 Ch. 860; as to partners, see Ord. IX. r. 6, p. 455, *ante*.

General agent.

Service how substituted on a company; see *Gaskell* v. *Chambers*, 26 Beav. 262; *Re Petroleum Company*, 15 W. R. 29; *Re Unity, &c., Association*, 11 W. R. 355; *Re London and Westminster Wine Company*, 3 N. R. 26; *Ex parte Chifferiel*, 6 N. R. 349.

As to substituted service in the case of a company whose office is closed,

On trustees.

If trustees avoid service after naming a place where they may be served with notice of applications, service at such place may be held sufficient, *Ex parte Baugham*, 16 Jur. 355; see note (*q*), p. 73, *ante*.

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Process of substituting service.

A copy of the writ and of the order directing substituted service should be shown to the party served, *Jones* v. *Brandon*, 2 Jur. N. S. 437; see *Farrow* v. *White*, 1 J. & W. 643.

Subsequent proceedings.

As to substituted service of proceedings in a suit, see *Forster* v. *Menzies*, 16 Beav. 568; *Christie* v. *Cameron*, 3 W. R. 146; *Steel* v. *Gordon*, *ibid.*, 158; see *Skegg* v. *Simpson*, 2 De G. & Sm. 454; *e.g.*, of decrees and orders (*Re Mourilyan*, 13 Beav. 84; *Roby* v. *Scholes*, 1 W. R. 118; *Re Dufaur*, 16 Beav. 113; *Rider* v. *Kidder*, 12 Ves. 202); *Deanes* v. *Kitchin*, L. R. 13 Eq. 461; but see now Ord. XIII., r. 9, for the process in default of appearance.

Of motion to commit.

Personal service of notice of motion to commit for contempt could not be dispensed with, *Hope* v. *Beresford Hope*, W. N. (1868) 295, but where it was resisted with violence service by letter was allowed, *Francis* v. *Bailey*, W. N. (1869) 142.

Cons. Ord. XXXVII. r. 2.

It is provided by Cons. Ord. XXXVII. r. 2, with regard to all service not personal that—

Service to be before 7 o'clock.

2. *Service of all writs, notices, summonses, orders, warrants, documents, and other proceedings, not requiring personal service upon the person to be affected thereby, shall be made before seven o'clock in the evening except on Saturday, when it shall be made before two o'clock in the afternoon; and if made after seven o'clock in the evening on any day except Saturday, the service shall be deemed as made on the following day; and if made after two o'clock in the afternoon on Saturday service shall be deemed as made on the following Monday.*

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ORDER XI.

Service out of the Jurisdiction.

Service out of jurisdiction allowed where subject matter is within the jurisdiction.

1. Service out of the jurisdiction (*a*) of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and

whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

Discretion of the judge how to be exercised.

1A. Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract, wherever made, the judge, in exercising his discretion as to granting leave to serve such writ or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local Court of limited jurisdiction, having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the judge to exercise his discretion in manner aforesaid, and all such other particulars (if any) as he may require to be shown.

Service out of jurisdiction.

(*a*) The latter part of this rule (marked 1A) was added by the 5th rule of June, 1873; see *Green* v. *Running*, 34 L. T. N. S. 760, where a contract was made and broken in England, and the defendant being Irish leave was given to serve him out of the jurisdiction.

2 Will IV. c. 33 and 4 & 5 Will. 4, c. 82.

This order extends the former enactments on the subject, 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

On infants, lunatics, married women.

Leave may be given to serve infants out of the jurisdiction, *Anderson* v. *Stother*, 10 Jur. 383, and persons of unsound mind, *Biddulph* v. *Lord Camoys*, 7 Beav. 580; and married women (in which case service on a husband was held good service) *Steele* v. *Plomer*, 1 M. & G. 83, 2 Ph. 782, note; and foreign corporations, see *Lewis* v. *Baldwin*, 11 Beav. 153; *Scott* v. *Royal Wax Candle Coy.*, 24 W. R. 668; but against them notice of the writ only, and not the writ itself, must be served under this rule, *Westman* v. *Snickarefabrik* L. R. 1 Exch. D. 237.

Foreign corporations.

Peers.

As to service on peers, see *Anon.* 18 L. J. Ch. 229.

How limited to place or country.

The service need not be limited to any particular spot; thus leave was given to serve the defendant "in Scotland," *Blenkinsopp* v. *Blenkinsopp*, 2 Ph. 1; "in the Grand Duchy of Baden," *Preston* v. *Dickinson*, 9 Jur. 919; in the city of New York, or elsewhere in the U. S., *Kinnaird* v. *Kinnaird*, 18 L. T. N. S. 52; but not "in Scotland, or elsewhere out of the jurisdiction," *Phospho-Guano Company* v. *Guild*, L. R. 17 Eq. 432.

Discretion of Court.

For the discretion of the Court under the Cons. Ord. X. r. 7 (*supra*), to

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allow service out of the jurisdiction, see *Drummond* v. *Drummond*, L. R. 2 Ch. 32 ; *Preston* v. *Lamont*, W. N. (1876) 24 ; *Phospho-Guano Company* v. *Guild*, L. R. 17 Eq. 432 ; *Davis* v. *Park*, L. R. 8 Ch. 862, note.

Service of interrogatories.

The order for service out of the jurisdiction may provide for service of interrogatories and the issuing of an injunction, *Young* v. *Brassey*, L. R. 1 Ch. Div. 277. See Ord. LIII. r. 8, *post*.

Petitions.

Petitions have been allowed to be served out of the jurisdiction, see note at head of p. 74, *ante* ; *Shurmer* v. *Hodge*, W. N. (1866) 304 ; also

Of notices of motion and third party notice.

notices of motion, see *Swansea Shipping Company* v. *Duncan*, 45 L. J. Q. B. Div. 638 (where a third party notice under Ord. XVI. was allowed to be so served) ; *Weguelin* v. *Lawson*, 8 L. T. N. S. 763 ; *Hasluck* v. *Stewart*, 6 Sim. 321 ; *Green* v. *Pledger*, 3 Hare 165 ; *Hawarden* v. *Dunlop*, 2 Dr. & Sm. 155 ; *Godson* v. *Cook*, 7 Sim. 519 ; *Martigny* v. *Smith*, 18 W. R. 108 ; *Frizell* v. *Cotton*, *ibid.*, 369 ; *Meek* v. *Ward*, 10 Hare, App. lv. ; *Middleton* v. *Chichester*, 1 N. R. 255 ; *Kavanagh* v. *Watt*, 18 L. T. N. S. 18 ; *Piffard* v. *Beeby*, 19 L. T. N. S. 7 ; but see now Ord. XIX. r. 6 (p. 490, *post*), as to leaving notice with the proper officer.

Of administration summons.

Administration suits instituted by summons were held to be within the Cons. Ord. cited above, *Re Alcan*, 1 D. J. S. 398, reversing *Lester* v. *Bond*, 1 Dr. & Sm. 394.

Of Palatine suit.

As to service out of the jurisdiction in suits instituted in the Palatine Court, see *Waltham* v. *Goodyear*, 7 D. M. G. 77 ; *Wynne* v. *Hughes*, 26 Beav. 377 ; *Downes* v. *Jackson*, 14 W. R. 907.

A defendant served out of the jurisdiction may enter a conditional appearance and apply to have the order for service set aside by showing that it was not in accordance with the rules of the Court, in that the allegations in the pleadings, on which the order was founded, were untrue, *Hawarden* v. *Dunlop*, 2 Dr. & Sm. 155 ; *Maclean* v. *Dawson*, 27 Beav. 25 ; 4 De G. & J. 150 (but see *Tracy* v. *Smith*, 11 W. R. 458). Under the old practice it was held that the Court could look at the bill to satisfy itself that the case made by the plaintiff was not on the face of it absurd, *Maclean* v. *Dawson*, *ante*.

Cons. Ord. X. r. 7.

Cons. Ord. X. r. 7, provided as follows for services out of the jurisdiction :—

7. *Where a defendant in any suit is out of the jurisdiction of the Court.*

(1.) *The Court, upon application supported by such evidence as shall satisfy the Court in what place or country* * *such defendant is or may probably be found, may order that a copy of the bill under the stat.* 15 & 16 *Vict. c.* 86, *s.* 3, *and, if an answer is required, a copy of the interrogatories may be served on such defendant in such place or country, or within such limits as the Court shall think fit to direct.*

* See r. 3, *infra*.

(2.) *Such order shall limit a time after such service within which such defendant is to appear to the bill ; such time to depend on the place or country within which the copy of the bill is to be served.*† *And where an answer is required, such order shall also limit a time within which such defendant is to plead, answer, or demur, or*

† See r. 4, *infra*.

obtain from the Court further time to make his defence to the bill.

(3.) *At the time when such copy of the bill shall be served, the plaintiff shall also cause such defendant to be served with a copy of the order giving the plaintiff leave to serve such copy of the bill.*

(4.) *And if, upon the expiration of the time for appearing, it be shown to the satisfaction of the Court that such defendant was duly served with such copy of the bill and with a copy of the order, the Court may, upon the application of the plaintiff, order an appearance to be entered for such defendant.**

* See now Ord. XIII. 9, *post*, as to procedure on default of defendant.

[Rule 2 relates to Probate actions only.]

Evidence necessary.

3. Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit (*b*), or otherwise, showing in what place or country (*c*) such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

As to means of reaching defendant.

(*b*) See Cons. Ord. X. 7, *supra*, upon which it was held that the order would not be made if there were no means of effectually reaching the defendant, *Steele* v. *Stewart*, 1 H. & M. 793; but see *Innes* v. *Mitchell*, 1 De G. & J. 423; *Meiklan* v. *Campbell*, 24 Beav. 100; *Cook* v. *Wood*, 7. W. R. 424.

As to what affidavits in support of the application are required, see *Blenkinsopp* v. *Blenkinsopp*, 2 Ph. 1; *Fieske* v. *Buller*, 7 Beav. 581; *Preston* v. *Dickinson*, 9 Jur. 919; *Whitmore* v. *Ryan*, 4 Hare, 612; *Joseph* v. *Tyndall*, 13 L. J. Ch. 23, under the old rule, and compare *Brooke* v. *Morison*, 32 Beav. 652.

Place or country.

(*c*) See note (*a*), *supra*, as to limiting the leave to a particular place or country.

Limiting time for appearance.

4. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given (*d*).

(*d*) See Cons. Ord. X. 7, *supra*; *Whitmore* v. *Ryan*, 4 Hare, 612; *Brown* v. *Stanton*, 7 Beav. 582; *Gruning* v. *Priolcau*, 33 Beav. 221.

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Notice of lieu of service.

5. Notice in lieu of service shall be given in the manner in which writs of summons are served (*e*).

(*e*) See note (*f*) p. 452, *ante*.

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ORDER XII.

Appearance.

When appearance entered in London.

1. Except in the cases otherwise provided for by these rules a defendant shall enter his appearance in London.

When in district registry.

2. If any defendant to a writ issued in a district registry resides or carries on business within the district, he shall appear in the district registry.

When optional.

3. If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or in London.

When action to proceed in district registry.

4. If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear in the district registry and the others make default in appearance, then, subject to the power of removal hereinafter provided (*a*), the action shall proceed in the district registry (*b*).

(*a*) See Ord. XXXV. rr. 11—14, *post*.
(*b*) See Ord. XXXV., *post*, as to actions in the district registry.

When in London.

5. If the defendant appears, or any of the defendants appear, in London (*c*), the action shall proceed in London; provided that if the Court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or judge may order that the action may proceed in the district registry, notwithstanding such appearance in London.

(*c*) See note (*f*), *infra*, as to giving notice of appearance in London.

Entry of appearance.

* The Record and Writs Clerks,

6. (*d*) A defendant shall enter his appearance to a writ of summons by delivering to the proper officer* a memorandum in writing, dated on the day of delivering

the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person (*e*).

see note (*b*) p. (440) *ante.*

A defendant who appears elsewhere than where the writ is issued, shall on the same day give notice (*f*) of his appearance to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter directed to such address, and posted on that day in due course of post.

(*d*) This rule was substituted for the original rule by rule 5 of February, 1876.

(*e*) It was formerly provided by Cons. Ord. III. r. 9 that notice of appearance should in all cases be given at once to the adverse party, but now such notice need only be given under this rule, or when the appearance is after the time limited for appearance, r. 15, *infra.*

Cons. Ord. III. r. 9. Notice of appearance.

(*f*) Where the plaintiff sued in a district registry and the defendant appeared in London, it was held that notice to the London agent of the solicitor issuing the writ was sufficient, *Johnson* v. *Whitehead*, W. N. (1876) 10.

Notice of appearance elsewhere.

7. The solicitor of a defendant appearing by a solicitor (*g*) shall state in such memorandum his place of business, and, if the appearance is entered in the London office, a place to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registrar, a place to be called his addrees for service, which shall be within the district.

Defendant's solicitor's address for service.

(*g*) Defendants in the same interest should appear by one solicitor, but it is difficult to lay down any precise rule as to the circumstances under which parties are held to be in the same interest, so as to be allowed only one set of costs, if they sever in defence.

Defendant appearing by one or more solicitors.

Where one of a class of defendants is separately charged, and relief is prayed against him, he may appear separately and have his costs, *Shaw* v. *Johnson*, 9 W. R. 629 ; and see *Re Humber Ironworks Company*, L. R. 2 Eq. 15 ; where the costs payable on winding-up petitions are considered, and *Re European Banking Company*, *ibid.* 521 ; *Re Anglo Egyptian Navigation Company*, L. R. 8 Eq. 660.

Winding up petitions.

Trustees ought not generally to sever, *Gaunt* v. *Taylor*, 2 Beav. 346 ; see *Course* v. *Humphrey*, 26 Beav. 402 ; *Attorney-General* v. *Wyville*, 28 Beav. 464 ; where only one set of costs was allowed, the division being left to the taxing-master. In *Prince* v. *Hine* (No. 2), 27 Beav. 345 ; where only one set of costs was allowed, one of the trustees, who had alone obeyed an order for payment of money into court, by paying in the whole sum ordered to be paid in, was held entitled to the whole of the costs.

Trustees severing.

In general, trustees and their *cestuis que trusts*, are not justified in severing, *Farr* v. *Sheriffe*, 4 Hare, 528 ; and so with mortgagor and mortgagee, *Remnant* v. *Hood*, 27 Beav, 613 ; and see *Heinrich* v. *Sutton*, L. R. 6 Ch. 220.

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Husband and wife.

A husband and wife living apart were held entitled only to one set of costs, *Garey* v. *Whittingham*, 5 Beav. 268.

Parties living at a distance.

Where defendants live at a distance, this may be a sufficient ground for putting in several answers, *Aldridge* v. *Westbrook*, 4 Beav. 212 ; *Wiles* v. *Cooper*, 9 Beav. 299 ; *Russell* v. *Nicholls*, 9 Jur. 613 ; but see *Farr* v. *Sheriffe*, l. c.

Cons. Ord. XL. r. 12.

See Cons. Ord. XL. r. 12, which is as follows :—

Rule 12. Costs where same solicitor for several defendants.

12. *Where the same solicitor is employed for two or more defendants, and separate answers are filed, or other proceedings had, by or for two or more such defendants separately, the taxing-master shall consider, in the taxation of such solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper; and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.*

One solicitor setting down two pleas.

Where the same solicitor appeared for two defendants and set down a plea for each of them, he was allowed the costs of one only, *Tarbuck* v. *Woodcock*, 3 Beav. 289.

Taking two sets of copies.

Attending for two parties.

Where the same solicitor appeared for the receiver and a party to the suit, he was only allowed to charge for one copy of the receiver's account, *Sharp* v. *Wright*, 1 L. R. Eq. 634 ; and where one solicitor attended in chambers for two parties in different interests, the costs of one attendance only were allowed, *Brown* v. *Gellatly*, 15 W. R. 887.

The liability for costs *as between themselves*, of several plaintiffs or defendants employing the same solicitor, is discussed and the rules stated in *Re Colquhoun*, 5 D. M. G. 35.

Address for service of defendant appearing in person.

8. A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the London office a place, to be called his address for service, which shall not be more than three miles from Temple Bar, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district (*h*).

(*h*) Compare Ord IV. r. 2 and notes.

Memorandum of appearance without address not to be received.

9. If the memorandum does not contain such address it shall not be received ; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a judge, on the application of the plaintiff.

Memorandum of appearance.

10. The memorandum of appearance shall be in the form No. 6, Appendix (A), Part I. with such variations as the circumstances of the case may require (*k*).

(*k*) See Appendix of Forms, *post.*

To be entered in cause book.

11. Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the cause book.

Partners how to appear.

12. Where partners are sued in the name of their firm,* they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm.

* Ord. IX. r. 6.

12A. Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm (*l*).

(*l*) The latter part of this rule, marked 12A, was added by the 6th Rule of June, 1876.

One solicitor for two or more defendants.

13. If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

Solicitor's undertaking.

14. A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.

Time for appearance.

15. A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance he shall, on the same day, give notice (*m*) thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the Court or a judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

Notice of appearance after time.

(*m*) See 15 & 16 Vict. c. 76 s. 29 ; Chitty's Statutes, III. 727.

[Rule 16 relates to parties intervening in Probate actions.]

[Rule 17 relates solely to Admiralty actions *in rem.*]

Order XII.

Appearance by person in possession of land.

18. Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant (*n*).

(*n*) See 15 & 16 Vict. c. 76, ss. 172—174; Chitty's Statutes, III. 748.

Appearance and defence by landlord.

19. Any person appearing to defend an action for the recovery of land as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord (*o*).

(*o*) See reference, note (*n*) *supra*.

Notice of appearance and defence.

20. Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or judge to appear and defend, he shall enter an appearance according to the foregoing rules, intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

Notice to defend for part only.

21. Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance or in a notice intituled in the cause, and signed by him or his solicitor; such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

22. The notice mentioned in the last preceding rule may be in the form No. 7 in Part I. of Appendix (A) hereto, with such variations as circumstances may require (*p*).

(*p*) See Appendix of Forms, *post*.

Appearance by persons not parties.

Cons. Ord. III. r. 7, provided, with regard to appearances by persons not parties, as follows :—

Order XII.

7. *Where a person who is not a party appears in any proceeding either before the Court or in chambers, service upon the solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service.*

Cons. Ord. III. r. 7.

Where person not a party appears.

See as to service on solicitors, note (*a*) to Or. IV. r. 1, *ante*, p. 436.

Omission of address.

ORDER XIII.

Order XIII.

Default of Appearance.

1 (*a*). Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind (*b*) not so found by inquisition, the plaintiff may apply to the Court or a judge for an order that some proper person be assigned guardian (*c*) of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application (*d*) was after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application (*e*) served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or judge at the time of hearing such application shall dispense with such last-mentioned service.

Default of appearance by infant or person of unsound mind, appointment of guardian *ad litem*.

Cons. Ord. VII. r. 3.

(*a*) This rule is substantially identical with Cons. Ord. VII. r. 3.

Person of unsound mind or incapable of defending.

See further Ord. XVI. r. 6, as to infants defending by guardian *ad litem*, and Ord. XVIII. as to lunatics.

(*b*) A guardian *ad litem* will not be appointed to a person merely because he is in weak health (*Williams* v. *Hodge*, 1 M. & G. 516). In an old case where the defendant's competency was disputed, an inquiry was directed (*Lee* v. *Ryder*, 6 Madd. 294).

Person in weak health.

Order XIII.

Of great age.

A person of great age and incapable of giving a continuous attention to business, may be ordered to defend by guardian *ad litem*, *Newman* v. *Selfe*, 11 W. R. 764 ; *Steel* v. *Cobb*, *ibid.*, 298.

Order discharged on lunatic's recovery.

A lunatic defendant may move to discharge the guardian on his recovery, and should do so, or he will continue liable for the costs of the solicitor appointed by his guardian, *Frampton* v. *Webb*, 11 W. R. 1018 ; *Blyth* v. *Green*, W. N. (1876) 214.

Lunatic in asylum.

Where a defendant was of unsound mind, and confined in an asylum, the Court, on proof that she was made aware of the general nature of the claim against her, appointed a guardian under Cons. Ord. VII. r. 3 (*Elliston* v. *Sheldrake*, 2 L. T. N. S. 48).

Lunatic so found.

In the case of a lunatic found so by inquisition, the committee will be appointed guardian as of course. If the committee have an adverse interest another guardian will be appointed (*Worth* v. *Mackenzie*, 3 M. & G. 363).

It is quite irregular for a plaintiff to instruct a solicitor to take steps on behalf of a defendant of unsound mind, though in the same interest, without applying to the Court, *Camps* v. *Marshall*, L. R. 8 Ch. 462.

Who will be appointed.

(*c*) As to the appointment of a guardian for an infant to answer in a special case, see note to Ord. XXXIV. r. 1. If no relation will act (see *Moore* v. *Platel*, 7 Beav. 583 ; *Moore* v. *Cantley*, 10 Hare, App. xxiv.), the Court will name a solicitor guardian *ad litem*, *Thomas* v. *Thomas*, 7 Beav. 47 ; *Biddulph* v. *Camoys*, 9 Beav. 548 ; but attend to the recommendation of the defendant's family, *Charlton* v. *West*, 3 D. F. J. 156.

A person under disability will not be appointed guardian *ad litem*, nor the plaintiff in the suit. But there is no objection to appointing a defendant who has not a conflicting interest, *Anon*, 18 Jur. 770 : for example, a lunatic's brother who was a co-defendant, and had no adverse interest was appointed his guardian *ad litem* in *Bonfield* v. *Grant*, 10 W. R. 275. See *Sandford* v. *Sandford*, 11 W. R. 336 ; *Gee* v. *Gee*, 12 W. R. 187 ; *Biddulph* v. *Dayrell*, 15 L. J. Ch. 320, where the wife's solicitor was appointed guardian *ad litem* of her husband, a lunatic defendant, on proof that the husband had no adverse interest ; and *Leese* v. *Knight*, 10 W. R. 711, where a mother who had made a claim to dower adverse to her children, was required to make a special application to be appointed their guardian *ad litem* (though she had already been appointed by a common order). See, too, *Anon*, 9 Hare, xxvii., where it was said the Court would prefer some adult and competent relative having no adverse interest, to a solicitor or other stranger.

When the guardian dies, a special application to appoint a new one is necessary, *Needham* v. *Smith*, 6 Beav. 130.

Service of notice, on person under whose care the infant resides.

(*d*) Where the notice was served at the house of the mother of the infants and her second husband, the father being proved to be dead, such service was held to be a sufficient service within the terms of the rule (*Hitch* v. *Wells*, 8 Beav. 576 ; see, too, *Baker* v. *Holmes*, Dick. 18 ; *Thompson* v. *Jones*, 8 Ves. 141 : *Lane* v. *Hardwicke*, 5 Beav. 222). So where the infant defendants were concealed in their mother's house to avoid service, it was held that putting a copy of the subpœna under the door of the mother's dwelling-house was good service (*Clark* v. *Waters*, Smith's Ch. Pr., p. 253). In another case service on the rector of the college of which the infant was an undergraduate member, was held sufficient, the plaintiff being unable to discover where his father lived (*Christie* v. *Cameron*, 4 W. R. 589). But service on the uncle of an infant, not being his guardian, is improper (*Blackmore* v. *Howett*, 30 L. T. 101) ; and where the infant was articled to, and resident with, a surgeon, and it appeared from the affidavit that the notice was served upon him while so residing, but it did not state that the notice was served either personally upon or at the dwelling-house of the surgeon, the service was held insufficient (*Taylor* v. *Ansley*, 9 Jur. 1055).

Where infant resides abroad.

Though the rule applies to infants residing abroad (*O'Brien* v. *Maitland*, 10 W. R. 375 ; *Anderson* v. *Stather*, 10 Jur. 383) ; yet where an infant defendant, having no substantial interest in the suit, was abroad, the

Court dispensed with service of notice of the application, *Lambert* v. *Turner*, 10 W. R. 335; *Turner* v. *Snowdon*, 2 Dr. & S. 265; see *Chaffers* v. *Baker*, 5 D. M. G. 482; *Lingren* v. *Lingren*, 7 Beav. 66; and where service could not be effected the Court ordered amendment by striking out the name of the infant, saving just exceptions, *Blackmore* v. *Howett*, 30 L. T. 101. Order XIII.

(*e*) Sunday was reckoned as one of the six days, *Brewster* v. *Thorp*, 11 Jur. 6. Six days.

2. Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this order, or under Order XV. rule 1, he shall, before taking such proceeding upon default, file an affidavit of service (*f*), or of notice in lieu of service, as the case may be (*g*). Affidavit of service.

(*f*) Cons. Ord. X. r. 8, provided as follows:— Cons. Ord. X. r. 8. Affidavits of service, to state particulars of service

Affidavits filed for the purpose of proving the service of a copy of a bill upon any defendant shall state when, where, and how the same was served, and by whom such service was effected.

Ord. IX. r. 13, p. 456, *ante*, is to the same effect.
The solicitor applying to enter final or interlocutory judgment in default of appearance, must produce—

1. The original writ.
2. The original affidavit of service, Ord. IX. r. 13.
3. The Record and Writ Clerks' certificate of no appearance.
(*Registrar's Instructions*, July, 1876.)

(*g*) See Ord. XIX. r. 6, *post*, for the mode of delivering documents and pleadings to the proper officer, where defendant has not appeared. Ord. XIX. r. 6.

3. "In case of non-appearance by the defendant where the writ of "summons is specially indorsed, under Ord. III. r. 6, the plaintiff may "sign final judgment for any sum not exceeding the sum indorsed on "the writ, together with interest at the rate specified, if any, to the date of "the judgment, and a sum for costs, but it shall be lawful for the Court "or a judge to set aside or vary such judgment upon such terms as "may seem just." (See 15 & 16 Vict. c. 76, s. 27; Chitty's Statutes, III. 726). Final judgment upon writ specially indorsed.

4. "Where there are several defendants to a writ specially indorsed for "a debt or liquidated demand in money, under Ord. III. r. 6, and one or "more of them appear to the writ, and another or others of them do not "appear, the plaintiff may enter final judgment against such as have not "appeared, and may issue execution upon such judgment without pre-"judice to his right to proceed with his action against such as have "appeared." (See 15 & 16 Vict. c. 76, s. 33; Chitty's Statutes, III. 727). Against defendants who do not appear.

5. "Where the defendant fails to appear to the writ of summons and "the writ is not specially indorsed, but the plaintiff's claim is for a debt "or liquidated demand only, no statement of claim need be delivered, but "the plaintiff may file an affidavit of service or notice in lieu of service, "as the case may be, and a statement of the particulars of his claim in "respect of the causes of action states in the indorsement upon the writ, Judgment for non-appearance to claim for liquidated demand.

Order XIII.

"and may, after the expiration of eight days, enter final judgment for the "amount shown thereby and costs to be taxed, provided that the "amount shall not be more than the sum indorsed upon the writ besides "costs." (See 15 & 16 Vict. c. 76, s. 28; Chitty's Statutes, III. 727.)

Judgment for want of appearance in district registry.

5A. "Where a defendant fails to appear to a writ of "summons issued out of a district registry, and the de- "fendant had the option of entering an appearance either "in the district registry or in the London office, judgment "for want of appearance shall not be entered by the "plaintiff until after such time as a letter posted in "London on the previous evening, in due time for delivery "to him on the following morning, ought, in due course "of post, to have reached him." (R. 7 of Dec. 1875.)

Where claim is for detention of goods.

*Ord. XXIX. r. 4.

6. "Where the defendant fails to appear to the writ of summons and "the plaintiff's claim is not for a debt or liquidated demand only, but for "detention of goods and pecuniary damages, or either of them, no state- "ment of claim need be delivered, but interlocutory judgment may be "entered,* and a writ of inquiry shall issue to assess the value of the goods "and the damages, or the damages only, as the case may be, in respect of "the causes of action disclosed by the indorsement on the writ of summons. "But the Court or a judge may order that, instead of a writ of inquiry, the "value and amount of damages, or either of them, shall be ascertained in "any way in which any question arising in an action may be tried." (See 15 & 16 Vict. c. 76, s. 28, *ubi sup.*)

Action to recover specific chattels.

This rule does not apply to an action for recovery of specific chattels. In such an action judgment may be signed and return of the chattels enforced without valuation or judge's order (*Ivory* v. *Cruickshank*, W. N. (1875) 249).

Where claim is for recovery of land.

* Ord. XII. r. 21.

7. "In case no appearance shall be entered in an action for the recovery "of land, within the time limited for appearance, or if an appearance be "entered but the defence be limited to part only,* the plaintiff shall be at "liberty to enter a judgment that the person whose title is asserted in the "writ shall recover possession of the land, or of the part thereof to which "the defence does not apply." (See 15 & 16 Vict. c. 76, s. 177, Chitty's Statutes, p. 748.)

Joining claim for mesne profits, &c.

8. "Where the plaintiff has indorsed a claim for mesne profits, arrears of "rent, or damages for breach of contract, upon a writ for the recovery of "land, he may enter judgment as in the last preceding rule mentioned for "the land; and may proceed as in the other preceding rules of this order as "to such other claim so indorsed."

Procedure in default of appearance on affidavit of service.

9. In actions assigned by the 34th section of the Act to the Chancery Division, and in probate actions, and in all other actions not by the rules in this order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit

of service the action may proceed as if such party had appeared (*h*). Order XIII.

(*h*) This rule enables a plaintiff, when the defendant does not appear, to proceed (without attaching the defendant under Cons. Ord. X. r. 10, or entering an appearance for the defendant) to get judgment under Ord. XXIX. r. 10 (see *Provident Permanent Building Society* v. *Greenhill*, L. R. 1 C. D. 624, where a bill filed under the old practice was treated as a statement of claim for the purpose) ; but a plaintiff cannot enter judgment in default of appearance without further proceedings in any action specially assigned to the Chancery Division. Judgment in default of appearance

[Rule 10, relating to admiralty actions *in rem*, is annulled by rule 8 of Dec., 1875.]

ORDER XIV. Order XIV.

Leave to Defend where Writ specially Indorsed.

1. "Where the defendant appears on a writ of summons specially indorsed, under Order III. rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs, and the Court or judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or judge that he has a good defence to the action on the merits, or disclose such facts as the Court or judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly." (See *Berry* v. *Exchange Trading Company*, L. R. 1 Q. B. Div. 77 ; *Runnacles* v. *Mesquita*, 45 L. J. Q. B. Div. 407.) Application to sign judgment where writ specially indorsed.

2. "The application by the plaintiff for leave to enter final judgment under the last preceding rule shall be made by summons returnable not less than two clear days after service." By summons.

3. "The defendant may show cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant to attend and be examined upon oath ; or to produce any books or documents or copies of or extracts therefrom." How defendant may show cause against the application.

4. "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim." Judgment for part of the amount claimed.

5. "If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled Or against some defendants.

Order XIV.

"to enter final judgment against the latter, and may issue execution upon "such judgment without prejudice to his right to proceed with his action "against the former."

Leave to defend on giving security, &c.

6. "Leave to defend may be given unconditionally or subject to such "terms as to giving security, or otherwise, as the Court or a judge may "think fit."

Order XV.

ORDER XV.

Application for Account where Writ indorsed under Order III. Rule 8.

Order for accounts with usual directions.

1. In default of appearance to a summons indorsed under Order III. rule 8, and after appearance unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order (*a*) for the account claimed, with all directions (*b*) now usual in the Court of Chancery in similar cases shall be forthwith made.

Ord. XXXIII.

(*a*) Compare the power given to the judge to order accounts and inquiries at any stage by Ord. XXXIII., *post.*

The application is to be by summons (see next rule).

Prosecution of accounts and procedure in chambers.

(*b*) See Cons. Ord. XXXV. rr. 22, 23, *ante*, p. 145, providing for the prompt prosecution of inquiries and accounts, and *ibid.*, rr. 33—44, p. 148, *ante*, as to advertisements for claimants and the coming in of claimants and hearing of claims; *ibid.*, r. 45, as to computation of interest, &c.; and rr. 46—48, as to form of certificate; rr. 49—56, as to its approval by the judge.

By Cons. Ord. XXIII. rr. 14—16, it is provided as follows:—

Rule 14. Usual directions.

Rule 14. *Every decree or order for an account of the personal estate of a testator or intestate shall contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.*

Rule 15. To be numbered.

Rule 15. *Where by any decree or order, whether made in Court or in chambers, any accounts are directed to be taken or inquiries to be made, each direction shall be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number, and such decree or order may be in the form set forth in schedule (D), with such variations as the circumstances of the case may require.**

* See the forms in Seton.

Order XV.

Rule 16. *In taking any account directed by any decree or order, all just allowances shall be made, without any direction for that purpose in such decree or order.*

Just allowances.

What are just allowances are not usually determined by the Court in the first instance, see *Brown* v. *De Tastet*, Jac. 294. As to giving special directions, see 15 & 16 Vict. c. 86, s. 54, *ante*.

Special directions.

2. An application for such order as mentioned in the last preceding rule shall be made by summons, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

Application by summons.

ORDER XVI.

Order XVI.

Parties.

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct (*a*)

Joinder of plaintiffs claiming jointly, severally, or in the alternative.

(*a*) No action is to be defeated by reason of misjoinder (r. 13, *post*). Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant, Ord. XVII. r. 6, *post*.

Joinder of plaintiffs joint and separate claims.

2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a judge may, if satisfied that it has been so commenced through a bonâ fide mistake, and that it is necessary for the determination of

Substitution or additions of plaintiff.

Order XVI.

the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just (*b*).

When and how applied for.

(*b*) See as to the time and mode of application, r. 14, *infra*, and *Tildesley* v. *Harper*, W. N. (1876) 186, where, in an action to set aside mortgagees, V.-C. Hall, on an application *ex parte* for an order to strike out the plaintiff (a trustee) and to substitute three infant plaintiffs and to make the plaintiff a defendant, said that the three infants might be made plaintiffs by a next friend, and then, if there were any misjoinder, he would at the hearing order the plaintiff's trustee to be treated as a defendant. He said that he could not alter the parties to an action on an *ex parte* application, but the plaintiff might give the defendants notice that an order had been made in those terms, and require them to state whether they objected to the order or required notice, with an intimation that the Court considered they ought to have been served.

Joinder of defendants liable jointly, severally, or in the alternative.

3. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more (*c*) of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

(*c*) See r. 5, *infra*, and note.

Of defendants not interested as to all the relief prayed for.

4. It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein ; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest (*d*).

(*d*) See the cases on multifariousness in Daniell, ch. vi., s. 4, and *Pointon* v. *Pointon*, L. R. 12 Eq. 547 ; *Cousens* v. *Rose*, *ibid.*, 366 ; *Coates* v. *Lyard*, L. R. 19 Eq. 56 ; *Ward* v. *Sittingbourne Ry.*, L. R. 9 Ch. 488.

Of any of the persons severally or jointly liable.

5. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes (*e*)

Cons. Ord. VII. r. 2.

(*e*) Compare Cons. Ord. VII. rule 2, by which it was provided as follows :—

Rule 2. Parties jointly and severally

Where the plaintiff has a joint and several demand against several persons, either as principals or sureties

it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

liable as principals or sureties.

The following cases were decided under this rule as to suing partners or trustees separately from their co-partners or co-trustees, *Coppard* v. *Allen*, 2 D. J. S. 173, 180; *M'Gachen* v. *Dew*, 15 Beav. 84; *Devaynes* v. *Robinson*, 24 Beav. 99; *Atkinson* v. *Mackreth*, L. R. 2 Eq. 570; *Gray* v. *Lewis*, L. R. 8 Eq. 526, 10 Ch. 1052; *St. Aubyn* v. *Smart*, L. R. 3 Ch. 646; *Plumer* v. *Gregory*, L. R. 18 Eq. 621, 627; from which it would seem that where a *general* account and *general* administration was sought, or might be involved in the suit, all the partners or trustees should be parties; but where such persons were sought to be made liable for an *ascertained* amount, the general order applied.

As to suing trustees, &c., separately from co-trustees.

Where the suit will lead to a general administration.

The personal representative of an executor or trustee who has never acted or received assets was not, even before this rule, a necessary party to a suit for administration of the estate: see *Pitt* v. *Brewster*, Dick, 37; and comp. *Masters* v. *Barnes*, 2 Y. & C. Ch. 616, with *Hall* v. *Austin*, 2 Coll. 570, and *Holland* v. *Prior*, 1 M. & K. 237, where the executor had both acted and received assets.

Where co-trustee never acted.

6. Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action.

Of defendants where it is doubtful which is liable.

7. Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto (*f*).

Trustees, executors, and adminis-trators representing beneficiaries.

(*f*) This rule is an extension of 15 & 16 Vict, c. 861, s. 42 (9), p. 187, *ante*, which is incorporated with r. 11 *infra* (p. 480) and provided that in suits concerning real or personal estate vested in trustees such trustees should represent the persons beneficially interested to the same extent as the executors in suits concerning personal estate represent the persons beneficially interested.

15 & 16 Vict. c. 86, s. 42 (9).

It was held that this sub-section did not apply when the trustees had disclaimed (*Young* v. *Ward*, 10 Hare, App. lviii.), and see *Stansfield* v. *Hobson*, 16 Beav. 189.

Trustees representing *cestuis qui trusts*.

It was said that as a general rule the trustees of mortgageed property

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would not under this section represent their *cestuis que trusts* in a suit to foreclose them, *Tudor* v. *Morris*, 1 Sm. & Giff. 503 ; *Cropper* v. *Mellersh*, 24 L. J. Ch. 430 ; *Goddess* v. *Williams*, 2 Y. & C. C. C. 595 ; *Wilton* v. *Jones*, *ibid.*, 244 ; but see *Wilkins* v. *Reeves*, 3 W. R. 305 ; *Goldsmid* v. *Stonehewer*, 9 Hare, App. xxxviii. ; *Fowler* v. *Bayldon*, 9 Hare, App. lviii. ; *Sifken* v. *Davies*, Kay, App. xxi. ; *secus*, if besides being trustees of the land they had under their control funds applicable to the purpose of redemption, *Marriott* v. *Kirkham*, 3 Giff. 536, 8 Jur. N. S. 379 (*Sale* v. *Kitson*, 3 D. M. G. 119 ; *Hanman* v. *Riley*, 9 Hare, App. xl.) ; see as to redemption suits *Stansfield* v. *Hobson*, 16 Beav. 189.

On redemption suits.

Trustees of friendly society.

A friendly society which had no treasurer or board to represent it, and had become insolvent, and long since ceased to exist, was held to be sufficiently represented on the record by the trustees, *Pare* v. *Clegg*, 29 Beav. 589. See, too, *Bromley* v. *Williams*, 1 N. R. 413.

Not in suit to set aside a settlement.

Trustees were held not to represent their *cestuis que trusts* on a bill to set aside a settlement (*Reed* v. *Prest*, 1 K. & J. 183), and in a suit to restore trust property instituted by the representatives of a trustee against his co-trustee, both of whom had committed breaches of trust, in which some of the *cestuis que trusts* had occurred, such *cestuis que trusts* were held necessary parties (*Jesse* v. *Bennett*, 6 D. M. G. 609 ; see, too, *Devaynes* v. *Robinson*, 24 Beav. 86, 99, and *Payne* v. *Parker*, 1 L. R. Ch. 327).

Married women and infants, how to sue and be sued.

8. Married women and infants may respectively sue as plaintiffs by their next friends (*g*) in the manner practised in the Court of Chancery before the passing of this Act ; and infants may, in like manner, defend any action by their guardians (*h*) appointed for that purpose. Married women may also, by the leave of the Court or a judge, sue or defend without their husbands and without a next friend (*i*), on giving such security (if any) for costs as the Court or a judge may require.

Appointment of next friends.

(*g*) A next friend cannot be appointed without his written consent, see 15 & 16 Vict. c. 86, s. 11 (p. 174, *ante*), and as to the appointment and change of next friend of an infant, see *Talbot* v. *Talbot*, L. R. 17 Eq. 347, and compare Ord. XIII. r. 1, p. 467, *ante*.

Consents to procedure.

Consents as to procedure may be given by next friends, see *Knatchbull* v. *Fowle*, L. R. 1 C. D. 604 ; *Fryer* v. *Wiseman*, W. N. (1876) 3 ; s. c., 33 L. T. N. S. 779, and r. 24 of the general order of 5th Feb. 1861, which is as follows :—

Rule 24. Consents as to mode of procedure on behalf of persons under disability.

In all causes and matters to which any infant, married woman, person of unsound mind, whether found so by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence, or of any other procedure, shall, if given with the sanction of the Court or of the judge in chambers, by the next friend, guardian, committee, or other person acting on behalf of the person under such disability, have the same force and effect as if such party were under no disability, and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as

between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in lunacy.

Suits by next friend without authority.

As to suits by next friend without authority, see *Kenrick* v. *Wood*, L. R. 9 Eq. 333; *Re Potter*, 17 W. R. 347; *Davies* v. *Whitehead*, W. N. (1866) 162; *Williams* v. *Williams*, W. N. (1867) 205; and in the case of alleged lunatics, see *Palmer* v. *Walesby*, 3 L. R. Ch. 738, and notes to Ord. XVIII., *post*.

Married woman administratrix.

A married woman suing as administratrix should join her husband as co-plaintiff, and not sue by a next friend, *Burdick* v. *Garrick*, L. R. 5 Ch. 233, but in such cases mistakes as to parties may be amended at the hearing, *ibid.*, 238; *Mendes* v. *Guedalla*, 10 W. R. 485.

Costs of next friend.

A next friend is liable for costs, *Bligh* v. *Tredgett*, 5 De G. & Sm. 74, where a next friend, appointed without his own knowledge, was held, as between him and the defendants liable for costs. The next friend of an infant will *primâ facie* be held entitled to his costs, but the Court will look to his motives in instituting the suit, and if it finds that they were improper will refuse them to him (*Clayton* v. *Clarke*, 9 W. R. 718, L. J., overruling s. c. 2 Giff. 575).

Security for costs from next friend.

Security for costs may be required from the next friends of married women, but not from the next friends of infants, *Hind* v. *Whitmore*, 2 K. & J. 458; *Pennington* v. *Alvin*, 1 S. & S. 265; for the following reasons:—

(1) of infant is *not* required;

(1) In the case of infants the Court is always anxious that questions in which they are concerned should be brought under its notice, and it has a jurisdiction over suits by infants to stay them if improper; and therefore it allows any person to file a bill in the name of an infant, and does not require security for costs from an infant's next friend, either original or substituted, on the ground of poverty, *Fellows* v. *Barratt*, 1 Keen, 119; *Murrell* v. *Clapham*, 8 Sim. 74.

(2) of married woman *is* required;

(2) In the case of a married woman the Court has no jurisdiction to stay the suit; and therefore, to prevent improper suits, she must choose a substantial person for her next friend (*Wilton* v. *Hill*, 2 D. M. G. 807), even though the husband be a co-plaintiff (*Smith* v. *Etches*, 1 H. & M. 711), or another person joins in a petition of appeal (*Picard* v. *Hine*, L. R. 5 Ch. 274); and the Court will remove him, or order security for costs to be given, *Elliott* v. *Ince*, 7 D. M. G. 475, but only on evidence of his poverty, *Beach* v. *Sheddon*, 39 L. J. Ch. 123; *Giacometti* v. *Prodgers*, 21 W. R. 282.

Next friend bankrupt.

As to the effect of a next friend becoming bankrupt, see *Wilton* v. *Hill*, 2 D. M. G. 807; *Macann* v. *Borrodaile*, 16 W. R. 175; *Ex parte Claxton*, L. R. 7 Ch. 532.

Guardians *ad litem* for infant.

(*h*) Guardians *ad litem* for an infant defendant are appointed on the plaintiff's application, if the infant has not appeared, under Ord. XIII. r. 1, *ante*, p. 467, and if he has appeared, upon service on his solicitor, *Bentley* v. *Robinson*, 9 Hare, App. lxxvi.; see *ibid.*, xxvi.; *Cookson* v. *Lee*, 15 Sim. 302. As to the person who will be appointed, see note (*c*), p. 468, *ante*; when the guardian dies a special application for a new one must be made, *Needham* v. *Smith*, 6 Beav. 130.

Consents as to procedure may be given by guardians *ad litem*, see note (*g*), *supra*.

Cons. Ord. XL. r. 4.

Cons. Ord. XL. r. 4, provided with reference to the costs of a guardian *ad litem*, where the guardian is a solicitor, as follows:—

Costs of guardian *ad litem* where a solicitor is guardian.

Where the Court appoints one of the solicitors of the Court to be guardian ad litem *of an infant or person of unsound mind, the Court may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid, either by the parties or some one*

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or more of the parties to the suit in which such appointment is made, or out of any fund in Court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs, as the justice and circumstances of the case may require.

Costs of solicitor guardian *ad litem.*

Where the solicitor to the Suitors' Fee Fund is appointed guardian to a defendant, who is an infant or of unsound mind, at the instance of the plaintiff, it is the settled rule that the plaintiff shall pay his costs in the first instance, and add them to his own (*Fraser* v. *Thompson*, 4 De G. & J. 659; *Newbury* v. *Marten*, 15 Jur. 166), even in a foreclosure suit, where the security is insufficient, *Harris* v. *Hamlyn*, 3 De G. & S. 470; see *Ex parte Davies*, 16 Jur. 882. But in a partition suit, the guardian's costs were ultimately charged on the infant's share, *Robinson* v. *Aston*, 9 Jur. 224; and see *Robey* v. *Whitewood*, there cited.

The Court had no jurisdiction to order the costs of a defendant, to whom the solicitor to the Suitors' Fee Fund is appointed guardian, to be paid out of the suitors' fund (*Fraser* v. *Thompson*, 4 De G. & J. 652).

Costs where lunatic recovers.

Where a person of unsound mind, to whom a guardian *ad litem* has been appointed, recovers before the hearing, he must pay the costs of the guardian before obtaining an order to substitute his own solicitor, but may add such costs to his own costs of suit (*Frampton* v. *Webb*, 11 W. R. 1018).

The guardian *ad litem* is not liable for costs except in case of gross misconduct, *Morgan* v. *Morgan*, 11 Jur. N. S. 233.

Order for married woman suing or defending apart from husband.

(*i*) By 33 & 34 Vict. c. 93, s. 11 (p. 315, *ante*), a married woman may maintain an action in respect of separate property, or of property belonging to her before marriage which her husband has agreed shall belong to her as her separate property.

Who may obtain it.

If the case is one of those in which a *feme covert* ought to defend as a *feme sole*, the plaintiff may obtain the order without her concurrence, *e.g.*, if the husband is abroad, and she has separate property (*Nichols* v. *Ward*, 2 M. & G. 140; *Bull* v. *Withey*, 9 Jur. N. S. 595; *Bunyan* v. *Mortimer*, 6 Madd. 278; *Richardson* v. *De Held*, 1 N. R. 5; *Hole* v. *Dubois*, 2 Ves. 613), or if he is insane (*Estcourt* v. *Ewington*, 9 Sim. 252), but not merely because he is in prison (*Anon.* 2 Ves. Jur. 332).

Process against married woman defending separately.

Under the old practice, if the wife refused to join in answering, her husband might, on an affidavit of no collusion, have obtained an order by motion (on notice to the plaintiff) that process of contempt on that account be stayed against him, and that she might defend separately, *Barry* v. *Cane*, 3 Madd. 472; *Lenaghan* v. *Smith*, 2 Ph. 537; *Garey* v. *Whittingham*, 1 S. & S. 163; *Hope* v. *Carnegie*, L. R. 7 Eq. 263; *Bray* v. *Akers*, 15 Sim. 610; *Woodward* v. *Conebear*, 8 Jur. 642.

Action on behalf of other parties having same interest.

9. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

Court may construe instrument before ascertaining heir-at-law, next of kin, or class.

9A. In any case in which the right of an heir-at-law, or the next of kin, or a class, shall depend upon the construction which the Court may put upon an instrument, and it shall not be known, or be difficult to ascertain, who is, or

are, such heir-at-law, or next of kin, or class, and the Court shall consider that in order to save expense, or for some other reason, it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin, or class, shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties, or class, so represented (*k*).

(*k*) The 2nd clause of this rule marked 9A, was added by rule 7 of June, 1876. Compare Cons. Ord. VII. r. 1, quoted p. 189, *ante*.

Rule 7 of June, 1876.

One of many joint owners of a ship was allowed to sue the charterers under this rule, *De Hart* v. *Stevenson*, L. R. 1 Q. B. Div. 313, and the Court refused to order the others to be added as plaintiffs under r. 13 (*ibid.*).

Suits "on behalf of."

See rule 11, *infra*, and 15 & 16 Vict. c. 86, s. 42, p. 186, *ante*; and as to dispensing with parties or appointing a person to represent them, see 15 & 16 Vict. c. 86, s. 44, and note, p. 189, *ante*.

15 & 16 Vict. c. 86, ss. 42–44.

The Court may make a decree in the absence of a trustee by s. 49 of the Trustee Act, 1850, p. 108, *ante*.

See as to making several of a numerous class represent the class both as plaintiffs and defendants, *Bromley* v. *Williams*, 32 Beav. 177; *Wooldridge* v. *Norris*, L. R. 6 Eq. 414; and as to shareholders' bills, *Hoole* v. *G. W. Railway*, L. R. 3 Ch. 262; *Atwool* v. *Merryweather*, L. R. 5 Eq. 467, note.

Representation of parties.

As to indorsing the writ "on behalf of" &c., see *Cooper* v. *Blissett*, L. R. 1 C. D. 691; *Worraker* v. *Pryer*, *ibid.*, 2 C. D. 109; *Adcock* v. *Peters*, W. N. (1876) 139; *Eyre* v. *Cox*, 24 W. R. 317.

Indorsement of writ "on behalf of."

10. Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who are co-partners in any such firm (*l*), to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.

Partners suing or sued in name of firm.

10A. Any person carrying on business in the name of a firm apparently consisting of more than one person, may be sued in the name of such firm. (*ll*)

(*l*) See Ord. IX. r. 6, *ante*, as to service on partners or any person carrying on business in the name of the firm, and Ord. XII. r. 12A, as to their appearance.

Service on and appearance of partners.

(*ll*) The latter part of this rule, marked 10A, was added by Rule 8 of June, 1876.

11. Subject to the provisions of the Act, and these rules, the provisions as to parties, contained in section 42 of 15

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& 16 Victoria, chapter 86, shall be in force as to actions in the High Court of Justice (*m*).

Parties representing others, next of kin, &c.

Cons. Ord. X. rr. 11–18.

(*m*) See this section, p. 186, *ante*, which provides for the representation of parties in the case of next of kin, legatees, and *cestuis que trusts*, and for service of notice of the decree on those who are thus represented. The old practice under Cons. Ord. X. rr. 11—18, of serving a copy of the bill on those against whom no direct relief was sought, is superseded by the practice under this section.

[Rule 12 relates only to Probate actions.]

Misjoinder of parties not to defeat actions.

13. No action shall be defeated by reason of the misjoinder (*n*) of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to

Parties may be struck out;

be just (*o*), order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out (*p*), and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added (*q*). No

or added with their consent or upon notice.

person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in manner hereinafter men-

* Rules 15, 16.

tioned,* or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

Cases under 15 & 16 Vict. c. 86, s. 49, as to misjoinder.

(*n*) This rule is an extension of 15 & 16 Vict. c. 86, s. 49, by which suits were not to be dismissed for misjoinder of plaintiffs, but the Court was to modify its decree according to special circumstances. See *Mendes* v. *Guedalla*, 10 W. R. 485; *Betts* v. *Thompson*, L. R. 6 Ch. 735; *Umfreville* v. *Johnson*, L. R. 10 Ch. 580, where two owners of distinct properties joined in a suit to restrain a nuisance; and see for a similar case, *Appleton* v. *Chapel Town Paper Co.*, 45 L. J. Ch. Div. 278.

Costs where plaintiff's

(*o*) The defendant is entitled to the costs occasioned where a plaintiff's action is defective as to parties, and so is struck out of the paper. See

Price v. *Berrington*, 2 Beav. 285 ; *Mitchell* v. *Bailey*, 3 Madd. 61 ; *Mason* v. *Franklin*, 1 Y. & C. Ch. 242, decided under Cons. Ord. XL. r. 21.

(*p*) Defendants were struck out on their own application, though they had put in a statement of defence, *Vallance* v. *Birmingham Investment Corporation*, L. R. 2 C. D. 369. See *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101.

action is defective as to parties.

(*q*) The Court refused to add parties, *on behalf of whom* an action was instituted under r. 9, as plaintiffs, in order to make them liable for costs, *De Hart* v. *Stevenson*, L. R. 1 Q. B. Div. 313. Any one who might have been fairly joined as a defendant under r. 3 may be added, *Edwards* v. *Lowther*, 24 W. R. 434, where a proprietor of a newspaper was added as a co-defendant with the publisher after issue joined. In an action for specific performance by a mortgagee under his power of sale, residuary legatees for whom the mortgagee had been a trustee claimed an interest in the property ; but a motion to add them as defendants, was refused with costs, as their presence was not necessary to enable the Court effectually and completely to adjudicate on and settle the questions of title involved in the action, *Harry* v. *Davey*, L. R. 2 Ch. Div. 721, 24 W. R. 576. When a company having a right of action against a former director for breach of trust, assigned its property, &c. (but not the right of action), to a new company, it was held that the new company could not join the directors of the old company as plaintiffs, and so sue for the breach of trust, *New Westminster Brewery* v. *Hannah*, W. N. (1876) 215.

Cons. Ord. XL. r. 21.

Striking out parties.

Adding parties.

What parties may be added as involved in the action.

The Attorney-General was added as informant by amendment, *Duke of Sutherland* v. *Tunstall Board*, 21 W. R. 244.

Adding Attorney-General.

Compare r. 2, *supra*, allowing substitution or addition of plaintiffs, and see *Maughan* v. *Blake*, L. R. 3 Ch. 32, where L. J. Rolt allowed various amendments as to parties.

General amendments as to parties.

The practice has been that if plaintiffs are *struck out* after any of the defendants have appeared, the continuing plaintiff must give security for costs, *Fellowes* v. *Deere*, 3 Beav. 353 ; *Drake* v. *Symes*, 3 D. F. J. 491. An infant plaintiff, on coming of age, being desirous of retiring from the suit, was made a defendant instead, *Bicknell* v. *Bicknell*, 32 Beav. 381.

14. Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

Application to amend parties.

15. Where a defendant is added, unless otherwise ordered by the Court or judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

Service of new defendant with writ ;

16. If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or

and statement of claim.

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notice or afterwards, within four days after his appearance.

Power to determine questions as between plaintiff, defendant, and third party.

17. Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a judge may on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined (*r*).

Power to bring in third parties (Act of 1873, s. 24 (3)).

(*r*) Under this and the next two rules, coupled with the Act of 1873, s. 24 (3), a wide power of bringing in third parties is given in cases where defendants claim a remedy over against such third parties, *Ex parte Smith, Re Collie*, L. R. 2 C. D. 51, 24 W. R. 310; and where plaintiffs and defendants allege that a suit is occasioned by the conduct of a third party, the Court will give leave to serve him with notice of the suit, so as to enable relief to be granted against him, *Treleaven* v. *Bray*, L. R. 1 C. D. 176, 45 L. J. Ch. 113, 33 L. T. N. S. 827. But a plaintiff is not to be delayed while a defendant is fighting a counter-claim not immediately connected with the plaintiff's claim, *Swansea Shipping Company (Limited)* v. *Duncan*, 45 L. J. Q. B. Div. 638; *Warner* v. *Twining*, 24 W. R. 536; *Pearson* v. *Lane*, W. N. (1875) 248. See *Harry* v. *Davey*, L. R. 2 Ch. Div. 721, 24 W. R. 515 (cited p. 481, *supra*); *Padwick* v. *Scott*, 2 L. R. Ch. Div. 736, 45 L. J. Ch. 350, cited in note to Ord. XIX. r. 3, *infra*, where an improper counter-claim was excluded under Ord. XXII. r. 9, *infra*. See the cases in note to that section as to what counter-claims are excluded.

To introduce counter-claim (see Ord. XIX. 3, XXII. 9).

Or third parties.

How far the third parties must be interested.

It has been held that the power for a defendant to give a third person notice, pursuant to rule 18, so as to have relief against such third person, is not limited to cases in which the claim of the defendant against such third person is identical with that of the plaintiff against the defendant, *Swansea Shipping Company (Limited)* v. *Duncan*, 45 L. J. Q. B. Div. 638; and see *Bower* v. *Hartley*, 24 W. R. 941, W. N. (1876) 224; and cases in note to r. 18, *infra*.

Notice of counter-claim between co-defendants.

Co-defendants can raise counter-claims against each other without notice under the 19th rule, by delivery of the counter-claim, *Shephard* v. *Beane*, L. R. 2 C. D. 223, where it was held that the word "notice" in this and the two following rules is applicable to third parties and not to co-defendants.

Where defendant claims remedy over or indemnity from third party.

18. Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice (*s*) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer * and served on such person according to the rules relating to the service of writs of summons. The

* The Record and Writ Clerks. See note (*b*) p. 440.

notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form or to the effect of the form No. 1 in Appendix (B) * hereto, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action (*t*). Order XVI.

* Appendix of Forms, *post*.

(*s*) See note to last rule.

(*t*) See as to this rule cases cited in note (*r*), *supra*.

Where defendant had sub-contracted with third party.

To a claim by plaintiffs for not accepting goods, the defendants raised the defence that the goods were not of the quality contracted for. The defendants having contracted with third parties for the goods on the same terms as in their contract with the plaintiffs, were allowed to cite them under this rule; and it was held that the third parties should be at liberty to appear and defend the action so far as regarded the question of the quality of the goods, and that they should be bound by the finding of the jury on that question, and that the question of costs should be reserved until after the trial, *Benecke* v. *Frost*, L. R. 1 Q. B. Div. 419.

Where a purchaser of goods became bankrupt, the person who had supplied him sued another person as the real though undisclosed purchaser, and such other person was allowed to give a third party notice to the trustee in bankruptcy, as having the goods in his hands, *Ex parte Smith*, *Re Collie*, 2 L. R. C. D. 51, 24 W. R. 310, 34 L. T. N. S. 603.

Where defendants had to sustain a suit for specific performance through the misconduct of their trustee, who refused to convey the legal estate, they were allowed to serve the trustee with a notice under this rule, *Treleaven* v. *Bray*, L. R. 1 C. D. 176, 24 W. R. 198, 33 L. T. N. S. 827.

Notice to be given to third party by plaintiff.

19. When under rule 17 of this order it is made to appear to the Court or a judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the Court or a judge, before or at the time of making the order for having such question determined, shall direct such notice (*u*) to be given by the plaintiff at such time and to such person and in such manner as may be thought proper, and if made at the trial the judge may postpone such trial as he may think fit (*v*).

(*u*) See *Shephard* v. *Beane*, L. R. 2 C. D. 223, cited in note to rule 17.

(*v*) See notes (*r*) and (*t*), *supra*, as to the practice under this rule.

Appearance by third party.

20. If a person not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's

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claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice (*w*). In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always, that a person so served and failing to appear within the said period of eight days may apply to the Court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a judge shall think fit.

(*w*) As to subsequent proceedings where a person not a party enters an appearance, see r. 21, *infra*.

Defence by new party coming in.

21. If a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the Court or a judge for directions as to the mode of having the question in the action determined; and the Court or judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just (*x*), and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken (*y*), and give such directions as to the Court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.

(*x*) See *Benecke* v. *Frost*, L. R. 1 Q. B. Div. 419, cited in note (*t*) to rule 18, *supra*.

Defendants were allowed to withdraw on new defendants taking their place and admitting cause of action and their liability, *Commissioners of Waterford* v. *Veale*, W. N. (1876) 23.

(*y*) As to service on persons appearing under this rule, compare Cons. Ord. III. r. 7, quoted p. 467, *ante*.

Order XVII.

ORDER XVII.

Joinder of Causes of Action.

Joinder of causes of action.

1. Subject to the following rules, the plaintiff may unite in the same action and in the same statement of

claim several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

What action may be joined with action for recovery of land.

2. No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held (*a*).

Leave to join actions for recovery of land,

(*a*) A claim for a receiver may be joined with an action to recover land, *Allen* v. *Kennet*, 24 W. R. 845.

An action to establish a will in Chancery being an action to establish title to land, is an action for "recovery of land," so as to require the leave of the Court for *its* joinder with another cause of action, *Whetstone* v. *Devis*, L. R. 1 Ch. Div. 99.

with administration action.

An heir-at-law being also one of next of kin, obtained leave to join an action for recovery of the land with an action for administration, *Kitching* v. *Kitching*, 24 W. R. 901.

An action for the administration of personal estate may be joined with an action to establish title to real estate where the plaintiff claims both estates under a common gift in the same will, *Whetstone* v. *Devis*, *ubi sup.*

So joinder of causes of action will be allowed where the suit is for recovery of land and of a deed relating to the land, *Cook* v. *Enchmarch*, L. R. 2 C. D. 111 ; *Manisty* v. *Kenealy*, 24 W. R. 919.

Foreclosure action.

A foreclosure action is not an action for recovery of land within the rules, and may be joined with an administration action without leave, *Turrell* v. *Slate Company*, W. N. (1876) 219.

By trustee in bankruptcy.

3. Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity.

By or against husband and wife.

4. Claims by or against husband and wife * may be joined with claims by or against either of them separately (*b*).

* See r. 7.

(*b*) As to separate defence by a wife, see Ord. XVI. r. 8, *supra.*

By or against executor or administrator.

5. Claims by or against an executor or administrator † as such may be joined with claims by or against him personally (*c*), provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

† See r. 7.

(*c*) See *Padwick* v. *Scott*, L. R. 2 Ch. Div. 736, 45 L. J. Ch. 350.

Order XVII.

Jointly and severally.
* See r. 7.

6. Claims by plaintiffs jointly may be joined with claims by them or any of them separately * against the same defendant.

7. The last three preceding rules shall be subject to rule 1 of this order, and to the rules hereinafter contained.

Order to confine the action,

8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

and exclude causes of action.

2. If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just (*d*).

(*d*) See cases cited in notes to Ord. XVI. r. 13, p. 480, *ante*.

Order XVIII.

ORDER XVIII.

Actions by and against Lunatics and Persons of Unsound Mind.

Actions by and against persons of unsound mind.

In all cases in which lunatics and persons of unsound mind not so found by inquisition (*a*) might respectively before the passing of the Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend (*b*) in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action

by their committees or guardians appointed for that purpose (*c*). Order XVIII.

(*a*) The jurisdiction in lunacy is given to judges entrusted with the care and custody of lunatics, by sect. 7 of Act of 1875. The appeal from orders made in lunacy is vested in the High Court of Appeal by sect. 18 of the Act of 1873. Jurisdiction over lunatics;

(*b*) The Chancery Division will not take upon itself the management, or disposition, or partition of the property of a person of unsound mind, see *Halfhide* v. *Robinson*, L. R. 9 Ch. 373; *Re Clough*, L. R. 15 Eq. 214; except where there is a trust, or partnership, or fraud, or other foundation for the jurisdiction, *Beall* v. *Smith*, L. R. 9 Ch. 93. In such cases it will act at the instance of a next friend, *ibid.*; *Morris* v. *Morris*, W. N. (1872) 167; *Jones* v. *Lloyd*, L. R. 18 Eq. 265; *Vane* v. *Vane*, L. R. 2 C. D. 124, where it was held that the Chancery Division has jurisdiction to give directions as to the maintenance, out of trust property, and guardianship of a person of unsound mind at the suit of such person by a next friend, but will not exercise it unless the property is small and proceedings are not intended to be taken in lunacy. If the person of unsound mind is found a lunatic, the Chancery jurisdiction ceases, *Beall* v. *Smith*, *ubi sup.* over persons of unsound mind not found lunatic.

A bill having been filed without authority in the name of a person who was afterwards proved to be sane, the next friend had to pay all costs, *Palmer* v. *Walesby*, L. R. 3 Ch. 732.

See the cases on applications in respect of such persons under the Trustee Relief act, p. 71, *ante*.

(*c*) See as to guardians *ad litem*, for persons of unsound mind not appearing, Ord. XIII. r. 1, *ante*. Guardians *ad litem*.

ORDER XIX. Order XIX.

Pleading Generally.

1. The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty, and Probate. Rules of pleading.

2. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint (*a*) the plaintiff shall within such time and in such manner as hereinafter prescribed,* deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as hereinafter prescribed† deliver to the plaintiff a statement of his defence, set off, or counter-claim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set off, or counter-claim.‡ Such statements shall be as brief as the nature of the case will admit, Statement of claim, statement of defence and reply.

* Order XXI. r. 1.

† Order XXII. r. 1.

‡ Order XXIV.

Order XIX.

and the Court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same (*b*).

When statement of claim may be dispensed with.

(*a*) Where an action is brought to execute the trusts of a deed, or other written instrument (*Boyes* v. *Cook*, 33 L. T. 778, V.-C. M.; but see *Green* v. *Coleby*, 24 W. R. 246, W. N. (1876) 31, V.-C. H.), or by a legatee to administer the estate of his testator (*Breton* v. *Mockett*, 33 L. T. 585 V.-C. M.), a statement of complaint should be delivered. *Secus*, in the case of an ordinary creditor's administration suit, *Taylor* v. *Duckett*, W. N. (1865) 193, M. R.

Although the signature of counsel is not obligatory under these rules, it is very desirable that every statement of claim should be signed by counsel, per V.-C. Malins in *Duckett* v. *Jones*, 33 L. T. 777.

(*b*) See as to striking out scandalous matter and unnecessary pleadings, Ord. XXVII. r. 1, *post*.

By the Additional Rules, August, 1876 (Special Allowances), clause 18.

Costs of unnecessary matter.

Referred to taxing-master.

"The Court or judge may, at the hearing of any cause or matter, or upon "any application or procedure in any cause or matter in Court or at "chambers, and whether the same is objected to or not, direct the costs of "any pleading, affidavit, evidence, notice to cross-examine witnesses, account, "statement, or other proceeding, or any part thereof which is improper, "unnecessary, or contains unnecessary matter, or is of unnecessary length, to "be disallowed, or may direct the taxing officer to look into the same and "to disallow the costs thereof, or of such part thereof as he shall find to be "improper, unnecessary, or to contain unnecessary matter, or to be of "unnecessary length; and in such case the party whose costs are so dis-"allowed shall pay the costs occasioned to the other parties by such unneces-"sary proceeding, matter, or length; and in any case where such question "shall not have been raised before and dealt with by the Court or judge, the "taxing officer may look into the same (and, as to evidence, although the "same may be entered as read in any decree or order) for the purpose afore-"said, and thereupon the same consequences shall ensue as if he had been "directed to do so."

Cases on Cons. Ord. XL. 7, 8, 9, 10, 11, as to unnecessary pleadings.

This rule supplies the place of Cons. Ord. XL. rr. 7, 8, 9, 10, 11.

The Court will in general leave to the taxing master the province of distinguishing what parts are unnecessary. See *Re Atkinson & Pilgrim*, 26 Beav. 151 (decided under the similar rule, Cons. Ord. XL. r. 9); *Watson* v. *Rodwell*, W. N. (1876) 214.

For form of direction, see *Burchell* v. *Giles*, 11 Beav. 34; *Woods* v. *Woods*, 5 Hare, 229; *Hanslip* v. *Kitton*, 8 Jur. N. S. 835; and observations of Lord Romilly in *Moore* v. *Smith*, 14 Beav. 396, and *Woods* v. *Woods*, 5 Hare, 229.

Unnecessary amendments.

See as to directions to the taxing-master to tax the costs occasioned by unnecessary amendments, *Burchell* v. *Giles*, 11 Beav. 34; *Watts* v. *Manning*, 1 S. & S. 421; *Pledge* v. *Buss*, Johns. 663; and where important allegations contained in the original bill were struck out by amendment, the plaintiff had to pay the additional costs occasioned, *Strickland* v. *Strickland*, 3 Beav. 242; and see *Bower* v. *Cooper*, 2 Hare, 408; *Mavor* v. *Dry*, 2 S. & S. 113; *Mounsey* v. *Burnham*, 1 Hare, 22.

Set-off and counter-claim by defendant.

3. A defendant in an action may set-off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-

claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim (*c*). But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof (*d*). Ord. XIX.

(*c*) In an action for rent a defendant was allowed to set up by way of counter-claim an alleged debt, and damages for non-performance of lessor's agreement, *Atwood* v. *Miller*, W. N. (1876) 11. Where A. sued B. on a bill, and B. defended by alleging that A. was really trustee for C., who owed B. money, B. was allowed to bring in C. and claim a set-off, *Macdonald* v. *Bode*, W. N. (1876) 23. Cases where allowed.

See as to set-off in administration of an insolvent estate, *Newell* v. *National Provincial Bank*, 24 W. R. 458.

(*d*) Where a plaintiff claimed 10,000*l.*, under a covenant in a deed, and the defendant put in counter-claims to the effect that the plaintiff ought to have satisfied the claim by other means, which introduced questions as to admission of affidavits, and a secret trust, such counter-claims were ordered to be struck out, *Padwick* v. *Scott*, L. R. 2 Ch. Div. 736, 45 L. J. Ch. 350, 24 W. R. 723. Where not allowed.

The Court may order that the counter-claim should be disposed of in an independent action, see Ord. XXII. r. 9, *post*. Ord. XXII. r. 9.

4. Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved (*e*), such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary (*f*). Forms similar to those in Appendix (C) hereto may be used. Pleading facts not evidence. Signature of counsel.

(*e*) *E.g.*, a pleading founded on a fraud should allege fraudulent intent generally, and not go into the particulars of the scheme, *Herring* v. *Bischoffscheim*, W. N. (1876) 77.

(*f*) See, however, *Duckett* v. *Jones*, 33 L. T. 777, where V.-C. Malins said it was very desirable that statements of claim should be signed by counsel.

5. Every pleading which shall contain less than ten* folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed (*g*). Pleadings when to be printed.

* Substituted for [three] by r. 9 of June, 1876.

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(*g*) See as to printing and delivery of copies, Additional Rules, August, 12, 1875, Ord. I.—V., *post.*

Pleadings and documents, how to be delivered.

6. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use, to the solicitor of every party who appears by a solicitor (*h*), or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party (*i*), then such pleading or document shall be delivered by being filed with the proper officer.*

* The Record and Writ Clerks, see note (*b*) p. 440. *ante.*

Delivery to solicitors.

(*h*) See Ord. IV. 1, and notes, as to appearance by solicitor, and indorsement of address, and service on him, and delivery of documents to him.

Delivery of notice of motion for judgment against a defendant not appearing.

(*i*) Notice of motion for judgment may be served on non-appearing defendants by being delivered or filed in the district registry from which the writ issued, or in the Office of Records and Writs, *Dymond* v. *Croft*, 24 W. R. 700 ; *Shephard* v. *Beane*, L. R. 2 C. D. 223 ; *Gardiner* v. *Hardy*, W. N. (1876) 185 ; *Morton* v. *Miller*, 24 W. R. 723.

If the defendant, who has not appeared, can be served with a summons personally, it is not necessary, to file the summons also with the proper officers, *Whitaker* v. *Thurston*, W. N. (1876) 232.

Pleadings to be marked with date, name of judge, and solicitor, &c.

7. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

Claim for general relief.

8. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief (*k*). And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence.

Claim for discovery only.

If the plaintiff's claim be for discovery only the statement of claim shall show it.

(*k*) See *Lord Hanmer* v. *Flight*, 24 W. R. 346, 347.

Relief in respect of distinct causes of complaint.

9. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may

be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts.

Pleading facts by way of set-off or counter-claim.

10. Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim (*l*).

Where facts not pleaded.

(*l*) When a defendant in his statement of defence and counter-claim does not comply with this rule, it is sufficient for the plaintiff, who wishes to put in issue the facts alleged by the defendant, to join issue under rule 21 of the order, as in such case rule 20 will not apply to the plaintiff's reply, *Hillman* v. *Mayhew*, 24 W. R. 485.

Where right to claim as executor or trustee on partnership firm denied.

11. If either party wishes to deny the right of any other party to claim as executor, or as trustee whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

[12 relates to probate actions only.]

No plea in abatement.

13. No plea or defence shall be pleaded in abatement.

No new assignment.

14. No new assignment shall hereafter be necessary or used (*m*). But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

(*m*) See *Earp* v. *Henderson*, W. N. (1876) 211, and note to form 9 in Appendix of Forms (C).

In actions for recovery of land defendant in possession need not plead his title.

15. "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as herein-before mentioned."

Plea of not guilty.

16. "Nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead he shall not plead any other defence without the leave of the Court or a judge."

Allegations in pleadings not denied to be

17. Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied

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taken to be admitted.

specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition (*n*).

(*n*) For the application of this rule to the case of a counter-claim, see *Rolfe* v. *Maclaren*, W. N. (1876) 142.

Judgment upon admission by default (Ord. XXIX. r. 2).

Where in an action upon a joint and several promissory note against husband and wife the statement of defence raised no defence as regarded the husband, an order was made under Ord. XXIX. r. 2, against the husband, without waiting for the determination of the question against the wife, *Jenkins* v. *Davies*, L. R. 1 C. D. 696, 24 W. R. 695; see, too, *Hillman* v. *Mayhew*, 24 W. R. 485, cited in note to r. 20.

Motion for order upon admissions (Ord. XL. 11).

If it is desired to take an order upon admissions it should be moved for under Ord. XL. 11, *post*, *Gillott* v. *Kerr*, W. N. (1876) 116; and an order against those who do not make admissions may at the same time be moved for under Ord. XXIX. rr. 10, 11, *Re Smith, Bridson, and Smith*, W. N. (1876) 103.

Traversing note obsolete (Cons. Ord. XIII).

The practice of filing a traversing note under Cons. Ord. XIII. for the purpose of putting a cause at issue against a defendant making no defence is obsolete, see *Gardiner* v. *Hardy*, W. N. (1876) 185.

18. Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released.

Pleading new and inconsistent claims.

19. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Denials to be specific.

20. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth (*o*).

(*o*) But this rule does not apply to the reply of the plaintiff where the defendant has himself omitted to comply with rule 10 in his statement of defence and counter-claim, *Hillman* v. *Mayhew*, 24 W. R. 485.

Joinder of issue.

21. Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in

his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted. Ord. XIX. Except as to facts admited.

22. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance (*p*). Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given. Evasive pleadings.

(*p*) See *Crossley* v. *Tomey*, L. R. 2 Ch. Div. 533; *Thorp* v. *Holdsworth*, 45 L. J. Ch. 406.

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise. Pleading illegality or insufficiency of contract.

24. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material. Pleading, effect of documents.

25. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. Pleading, fraudulent intention, &c.

26. Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material. Pleading notice.

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Pleading letters, conversations, &c.

27. Wherever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Presumptions of law.

28. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[*E.g.*—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

Pleadings in district registry.

29. Where an action proceeds in a district registry all pleadings and other documents required to be filed shall be filed in the district registry.

Actions for damage by collision.

[30 relates to actions for damage by collision between vessels.]

Ord. XX.

ORDER XX.

Pleading Matters arising pending the Action.

Grounds of defence arising pending the action.

1. Any ground of defence which has arisen after action brought (*a*), but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

(*a*) See 15 & 16 Vict., c. 76, s. 68; Chitty's Statutes, III., 733.

Further defence or reply.

2. Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a judge, deliver a further defence or further reply, as the case may be, setting forth the same (*b*).

(*b*) See 15 & 16 Vict. c. 76, s. 69, *ubi sup.*

Costs up to the time of such pleading.

3. Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the form No. 2 in Appendix (B) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order (*c*).

Bankruptcy of plaintiff.

(*c*) A plea of bankruptcy of the plaintiff after action brought is in the nature of a plea *puis darrein continuance*, and when confessed by the plaintiff operates as an avoidance of all other defences, so as to entitle the plaintiff to his costs up to the time of the pleading of the plea, *Foster* v. *Gamgee*, 24 W. R. 319, Q. B. Div.

ORDER XXI.

Statement of Claim.

Delivery of statement of claim.

1. Subject to rules 2 and 3 of this order, the delivery of statements of claim shall be regulated as follows:—

Where required.

(*a*.) If the defendant shall not state that he does not require the delivery of a statement of claim (*a*), the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver it within six weeks from the time of the defendant's entering his appearance (*b*).

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Where not required.

(*b.*) The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim, with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered unless otherwise ordered by the Court or a judge (*c*).

Costs of statement of claim not required.

(*c.*) Where a plaintiff delivers a statement of claim without being required to do so, the Court or a judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

Defendant need not require statement of claim.

(*a*) The defendant may dispense with a statement of claim, see form of Memorandum of Appearance, AA (App. of Forms, *post*) and note to Ord. XIX. r. 2.

(*b*) In default of such delivery the action may be dismissed for want of prosecution, Ord. XXIX. r. 1, *post*.

(*c*) As to extending the time, see Ord. XXIX. r. 1, and *Higginbotham* v. *Aynsley*, 24 W. R. 782, there cited, and Ord. LVII. r. 6, *post*, and see generally as to time, Ord. LVII.

Probate actions.

[2 relates only to Probate actions.]

Admiralty actions.

[3 relates only to Admiralty actions.]

Where writ specially indorsed.

4. "Where the writ is specially indorsed, and the defendant has not "dispensed with a statement of claim, it shall be sufficient for the plaintiff "to deliver as his statement of claim a notice to the effect that his claim is "that which appears by the indorsement upon the writ, unless the Court or "a judge shall order him to deliver a further statement. Such notice may "be either written or printed or partly written and partly printed, and "may be in the form No. 3 in Appendix (B) hereto, and shall be marked "on the face in the same manner as is required in the case of an ordinary "statement of claim. And when the plaintiff is ordered to deliver such "further statement it shall be delivered within such time as by such "order shall be directed, and if no time be so limited then within the time "prescribed by Rule 1 of this Order."

ORDER XXII.

Order XXII.

Defence.

1. Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days from the delivery of the statement of claim (*a*), or from the time limited for appearance, whichever shall be last, unless such time is extended* by the Court or a judge.

Statement of defence *shall* be delivered when there is a statement of claim.

* See Ord. LVII. and note (*b*), *infra*.

(*a*) When a plaintiff has to give security for costs, a defendant need not defend till security is given, Cons. Ord. XXXVII. cited in note to Ord. LV. r. 2, *post*.

When plaintiff has to give security for costs.

2. A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his appearance, unless such time is extended (*b*) by the Court or a judge.

May be delivered where no statement of claim.

(*b*) If the time for defence is extended generally, without limiting a shorter time for demurring alone, the defendant may demur after the time allowed by Ord. XXVIII. r. 3, and if it is desired to limit the time for "demurring alone," the order should be so expressed, *Hodges* v. *Hodges*, L. R. 2 Ch. Div. 112, 24 W. R. 293.

Time for demurring extended.

3. "Where leave has been given to a defendant to defend under Ord. "XIV. r. 1, he shall deliver his defence, if any, within such time as shall "be limited by the order giving him leave to defend, or if no time is "thereby limited, then within eight days after the order."

Time where writ specially indorsed and leave to defend given.

4. Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

Admissions.

5. Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons,† he shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such

Counter-claim introducing new persons.

† Ord. XVI. rr. 17-19.

To be delivered to such persons if parties.

Order XXII.

cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

To be served on such persons, if not parties.

6. Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the form No. 4 in Appendix (B) hereto,* or to the like effect.

* Appendix of Forms, *post.*

Appearance of person so served.

7. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.†

† Ord. XII. r. 6.

Reply.

8. Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time‡ within which he might deliver a defence if it were a statement of claim.

‡ R. 1, *supra.*

Order that counterclaim be disposed of by independent action.

9. Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the Court or a judge for an order that such counter-claim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just (*c*).

(*c*) See *Padwick* v. *Scott*, L. R. 2 Ch. Div. 736, 24 W. R. 723, 45 L. J. Ch. 350, cited in note to order XIX. r. 3.

Where in a set-off balance is in favour of defendant.

10. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance (*d*) is in favour of the defendant give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

(*d*) *I.e.*, the final balance at the hearing of the action, per V.-C. Hall in

Rolfe v. *McLaren*, 24 W. R. 816 ; therefore the Court will not give judgment against a plaintiff, who has omitted to plead to a counter-claim, and thereby admitted its statements, if the plaintiff has also claimed an account against the defendant, *ibid.* Order XXII.

[11 relates only to Probate actions.]

ORDER XXIII. Ord. XXIII.

Discontinuance.

When plaintiff may discontinue action wholly or in part on payment of costs.

The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action (*a*). Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may, before or at, or after (*b*) the hearing or trial, upon such terms as to costs (*c*), and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

Discontinuance not to be pleaded in bar.

When action may be discontinued or complaint or defence may be struck out by leave of judge.

(*a*) This abrogates in part Cons. Ord. XXIII. r. 13, by which a dismissal on the plaintiff's application could be pleaded in bar to another suit for the same matter. Cons. Ord. XXIII. r .13.

(*b*) See *Barton* v. *Barton*, 3 K. & J. 512, where after a decree, merely directing accounts and enquiries, the plaintiff was allowed to dismiss his own bill. Discontinuance after decree.

Order XXIII.

(e) See now r. 2*, *infra*; and *Markwick* v. *Pawson*, 4 N. R. 523; *Booth* v. *Leycester*, 1 Keen, 247; *Bernalston* v. *Churchill*, W. N. (1866) 8; *Clements* v. *Clifford*, 14 W. R. 22.

Withdrawal of cause by consent.

2. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties (*d*).

(*d*) This rule was added by rule 9 of Dec. 1875.

Costs when action is discontinued.

2* A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued (*e*).

(*e*) This rule was added by rules of May, 1876.

Costs under old practice.

Under the following circumstances a plaintiff has, under the old practice, been allowed to dismiss his bill *without* costs :—

1. If the bill was filed under a mistake common to both parties, *Broughton* v. *Lashmar*, 5 M. & C. 136. See, too, *Hansard* v. *Hardy*, 18 Ves. 460.

2. If the defendant had given the relief sought by the suit, *Wilde* v. *Wilde*, 10 W. R. 368, 503 (where, however, the plaintiff did not get all the costs of the suit), or if the bill had become unnecessary, but was originally justified by the defendant's misconduct or fraud, *Elsey* v. *Adams*, 2 D. J. S. 147; *Knox* v. *Brown*, 1 Bro. C. C. 186; *Godday* v. *Sleigh*, 3 W. R. 87; but see *Ventilation and Sanitary Improvement Company* v. *Edelsten*, 11 W. R. 613, where the motion was refused, the defendants resisting it, but the costs were made costs in the cause.

3. Where the plaintiff had been misled by a suggestion of the Court, *Lister* v. *Leather*, 1 De G. & J. 361; and see cases there cited.

Order XXIV.

ORDER XXIV.

Reply and Subsequent Pleadings.

Time for reply of plaintiff.

1. A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences (*a*) shall have been delivered, unless the time shall be extended* by the Court or a judge.

* See Ord. LVII.

Last of the defences.

(*a*) It was held under Cons. Ord. IX. r. 11, by which a plaintiff could obtain an order of course to amend within a certain time after the "last of the answers required to be put in," that the "last answer required" meant "the last answer required to be put in previous to replication" (*Arnold* v. *Arnold*, 1 Ph. 806), *i. e.*, the last of several answers filed by several defendants (*Forman* v. *Gray*, 9 Beav. 200; *Duncombe* v. *Lewis*, 10 Beav. 273; *Slinton* v. *Taylor*, 4 Hare, 608; whereas in Cons. Ord. XXXIII. 10,

relating to motions to dismiss, the same words meant "the last answer of one of several defendants," see *Sprye* v. *Reynell*, 10 Beav. 351. But if defendants were added by amendment after answer, the time was not reckoned from the time when the last of the *new* defendant's answers was sufficient, but from the time when the last of the *original* defendant's answers was sufficient, *Bertolacci* v. *Johnstone*, 2 Hare, 632; *Attorney-General* v. *Nethercoat*, 2 M. & Cr. 604. Order XXIV.

2. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then upon such terms as the Court or judge shall think fit. Joinder of issue.

3. Subject to the last preceding rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge. Subsequent pleadings by leave of judge. Time for subsequent pleadings.

ORDER XXV. Order XXV.

Close of Pleadings.

As soon as either party has joined issue upon any pleading of the opposite party simply (*a*) without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed. Where either party joins issue simply on last pleading, pleadings are closed.

(*a*) See *Earp* v. *Henderson*, W. N. (1876) 211, where plaintiff by his reply joined issue on the defence and also raised a new question and it was held that the defendant though he did not join issue within four days (Ord. XXIV. r. 3) could do so afterwards by leave of the Court. Joining issue simply.

ORDER XXVI. Order XXVI.

Issues.

Where in any action it appears to a judge that the statement of claim or defence or reply does not sufficiently define the issues of fact (*a*) in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the judge.* Settlement of issues of fact.

* Ord. LIV. r. 2.

(*a*) See as to trials of issue of fact with or without a jury, Ord. XXXVI. rr. 3, 6, 7, 26, 27, *post*, and by commissioners of assize, *ibid.*, r. 29; and as to dispensing with issues found unnecessary, see Ord. XL. r. 8. Trial of issue of fact.

Separate issues will not be allowed to be tried unless they will be decisive of the action, *Republic of Bolivia* v. *Bolivian Coy.*, 24 W. R. 361. See also notes (*d*) and (*e*), p. 559, *post*.

Order XXVII.

ORDER XXVII.

Amendment of Pleadings.

Amendment of writ of summons.

1. The Court, or a judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just (*a*).

Of other pleadings.

The Court or a judge may, at any stage of the proceedings, allow either party to alter (*b*) his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which

Scandal.

may be scandalous (*c*) or which may tend to prejudice, embarrass (*d*), or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

Where writ amended. Without prejudice to motion.

(*a*) The first part of this rule, allowing the writ to be amended, was added by r. 6 of February, 1876, *post*. In *Caldwell* v. *Pagham Harbour Reclamation Coy.*, L. R. 2 C. D. 221, an action was by amendment of the writ turned into an information, and action without prejudice to a pending motion.

See cases in next note as to amending without prejudice to injunction, &c.

Striking out amendments.

(*b*) Where a plaintiff had amended his bill, leave to strike out the amendments was granted, *Eagles* v. *Le Breton*, 5 L. T. N. S. 818.

Effect of amendment on injunctions and notices of motion.

An order to *amend* is without prejudice to an injunction (*Kennedy* v. *Lewis*, 14 Jur. 166; see *Attorney-General* v. *Marsh*, 10 Sim. 572; *Clarke* v. *Clark*, 13 W. R. 133; *Harding* v. *Tingey*, 12 W. R. 703), or a writ of *ne exeat*, *Grant* v. *Grant*, 5 Russ. 189, but where a plaintiff *amended after giving notice of motion*, the notice was gone (*Martin* v. *Frost*, 8 Sim. 199), unless the application so made without prejudice, *Child* v. *Douglas*, Kay, 560; *Smith* v. *Dixon*, 12 W. R. 934. So by amendment the plaintiff was considered to have purged a defendant's contempt, but the order for amendment might save the plaintiff's rights, see *Weightman* v. *Powell*, 2 De G. & Sm. 570.

Amendments allowed.

The following are examples of amendments allowed under the new practice.

For amendment as to parties, see Ord. XVI. 2, 13, p. 480, *ante*.

In *Budding* v. *Murdoch*, L. R. 1 Ch. Div. 42, on failure of the title claimed, acquiescence was allowed to be set up by amendment: See too *King* v. *Corke*, *ibid.*, 57, where a trustee's default being charged, but no acts of default averred, such acts were allowed to be charged by amendment, but on terms that the plaintiff should enter into no new evidence. In *Roe* v. *Davis*, L. R. 2 Ch. Div. 729, 24 W. R. 605, an action to set aside a settlement as voluntary was amended by pleading also the incapacity of the settlor. See *Watson* v. *Rodwell*, 24 W. R. 1009, as to the discretion of the Court.

Old practice.

The question what amendments were allowed under the old practice was fully discussed in *Darnley* v. *L. C. & D. Ry.*, 1 D. J. S. 204; see *Hume* v. *Pocock*, L. R. 1 Eq. 662; *Evans* v. *Bagshawe*, L. R. 8 Eq. 469; *Attorney-General* v. *Cambridge Gas Consumers Coy.*, L. R. 6 Eq. 282, 310; *Harrington* v. *Harrington*, L. R. 3 Ch. 564, 574.

A special order could only be obtained on affidavit that the amendments were material and could not with reasonable diligence have been previously introduced, Cons. Ord. IX. 15; see *Stuart* v. *Lloyd*, 3 M. & G. 181; *Attorney-General* v. *Fishmonger's Coy.*, 4 M. & Cr. 1; *Attorney-General* v. *Corporation of London*, 13 Beav. 313; *Champneys* v. *Buchan*, 3 Drew. 5; *Hemming* v. *Maddick*, L. R. 9 Eq. 175; *Attorney-General* v. *Castleford Local Board*, L. R. 6 Ch. 853.

Affidavit as to materiality and diligence.

An information cannot be amended without the sanction and signature of the Attorney-General, *Attorney-General* v. *Fellows*, 1 J. & W. 254.

Amendment of information.

(*c*) Under Cons. Ord. XVI. r. 21, scandalous matter might be expunged, and as to what is held scandalous, see *Jodrell* v. *Jodrell*, 12 Beav. 216; *Everett* v. *Prythergch*, 12 Sim. 363; *Christie* v. *Christie*, L. R. 8 Ch. 499. A bill containing scandalous matter was by consent of all parties ordered to be taken off the file (*Makepeace* v. *Romieux*, 8 W. R. 687, and see *Clifton* v. *Bentall*, 9 Beav. 105). A scandalous affidavit may be ordered to be taken off the file (*Goddard* v. *Parr*, 24 L. J. Ch. 783); or the scandalous matter may be expunged (*Re Bailey's Settlement*, 3 W. R. 31).

Scandalous statements.

As to costs in cases of scandals, see *Forester* v. *Read*, L. R. 6 Ch. 40.

(*d*) A statement of claim of enormous length was struck out altogether, *Cashin* v. *Cradock*, W. N. (1876) 197, 237; see further as to embarrassing pleadings, *Golding* v. *Wharton Saltwork's Coy.*, L. R. 1 Q. B. Div. 374; *Rolfe* v. *McLaren*, 24 W. R. 816.

Lengthy pleadings.

2. The plaintiff may, without any leave,* amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant † who shall have last appeared.

Amendments by plaintiff.

* Unless a demurrer is pending (Ord. XXVIII. r. 7).

† Ord. XXIV. r. 1.

3. A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply,‡ and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence.

By defendant.

‡ Ord. XXIV. r. 3.

4. Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court, or a judge, to disallow the amendment, or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it, subject to such terms as to costs or otherwise as may seem just (*e*).

Application to disallow amendments.

(*e*) As to costs of unnecessary amendments, see note to Ord. XIX. r. 2, *ante*.

Order XXVII.

Leave for the other party to amend.

5. Where any party has amended his pleading under rules 2 or 3 of this order, the other party may apply to the Court or a judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just.

Amendment by leave of Court.

6. In all cases not provided for by the preceding rules of this order, application for leave to amend any pleading may be made by either party to the Court or a judge in chambers, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just.

Time allowed for amending after order to amend.

7. If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order (*f*), or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a judge (*g*).

(*f*) The omission of the plaintiff to amend within the time limited was held under the old practice not to deprive him of his right to obtain a second order to amend, *Nicholson* v. *Peile*, 2 Beav. 497.

Further time allowed.

(*g*) Further time was refused in *Clarke* v. *Mayor of Derby*, 10 Jur. 978; *Vernon* v. *Vernon*, W. N. (1871) 118, 178; but see *Champneys* v. *Buchan*, 3 Drew. 5; *Bainbridge* v. *Baddeley*, 12 Beav. 152; *Crossley* v. *Dorning*, 15 W. R. 1078.

Written amendments.

8. A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than one hundred and forty-four words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended (*h*).

(*h*) See *John* v. *Lloyd*, L. R. 1 Ch. 64.

Amended pleading to be marked,

9. Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the

day on which such amendment is made, in manner following, viz.: "Amended day of ." Order XXVII.

10. Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same. and delivered to opposite party.

ORDER XXVIII.

Demurrer.

Order XXVIII.

1. Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action, or ground of defence to a claim or any part thereof (*a*), or set-off, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring. Demurrer to whole or part of pleading.

(*a*) The rule that all matters of fact appearing on the bill are admitted for the purposes of the demurrer has been carried so far, that the Court has refused to allow the inaccurate statement of a deed in the bill to be corrected by a reference to the deed itself (*Cuddon* v. *Tite*, 1 Gif. 395; and see *Campbell* v. *Mackay*, 1 M. & Cr. 603; but see note (*o*) to r. 9), and ambiguous statements in a bill may on demurrer be construed adversely to the pleader (*Vernon* v. *Vernon*, 2 M. & Cr. 145). A general allegation, *e.g.*, of a trust not supported by specific allegations, will not support a bill against a demurrer (*Grenville Murray* v. *Lord Clarendon*, L. R. 9 Eq. 11). Pleadings admitted for purpose of demurrer.

As to demurrer allowed to discovery but not to relief, see *U. S. of America* v. *McRae*, L. R. 3 Ch. 79.

2. A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party (*b*). It shall state some ground in law (*c*) for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated (*d*). A demurrer may be in the form 28 of Appendix (C) hereto.* If there is no ground, or only a frivolous ground of demurrer stated, the Court or judge may set aside such demurrer, with costs. To be specific.

* Appendix, *post.*

(*b*) By Cons. Ord. XIV. rr. 8, 9, demurrers were not to be overruled because they did not cover so much of the bill as they might, or because they covered a part to which the answer extended; see *Chetwynd* v. *Linden*, 2 Ves. Sen. 450; *Weatherhead* v. *Blackburn*, 2 V. & B. 121; *Osborne* v. *Jullion*, 3 Drew. 552; *Hicks* v. *Raincock*, 1 Cox 41, as to the rule in the text.

Order XXVIII.

(*c*) It must express clearly the grounds on which the defendant relies (*Attorney-General* v. *Jackson*, 11 Ves. 369; *Rayner* v. *Julian*, 2 Dick. 677, cited in note to *Salvidge* v. *Hyde*, 5 Madd. 144; *Barber* v. *Barber*, 4 Drew. 666).

Ground of demurrer.

(*d*) See Cons. Ord. XIV., r. 1, by which it is provided that—

Cons. Ord. XIV., r. 1.

Demurrer *ore tenus.*

Where any grounds of demurrer are urged on arguing a demurrer beyond the grounds therein expressed, and those grounds which are so expressed are disallowed, the defendant shall pay the same costs as if the demurrer were overruled, although the grounds of demurrer so newly urged may be allowed.

Grounds of.

It has been held that a defendant demurring on the record for multifariousness only may demur *ore tenus* for want of equity (*Rump* v. *Greenhill*, 20 Beav. 512; *Henderson* v. *Cook*, 4 Drew. 306). So a demurrer on the record for want of equity will enable a defendant to demur *ore tenus* for want of jurisdiction (*Barber* v. *Barber*, 4 Drew. 666), or for want of parties (*Cooper* v. *Earl Powis*, 3 De G. & Sm. 688).

Costs of.

Lord Eldon said, in *Attorney-General* v. *Brown*, 1 Sw. 288, followed in *Cooper* v. *Earl Powis*, 3 De G. & Sm. 389, and *Mortimer* v. *Fraser*, 2 M. & Cr. 173, that a defendant availing himself of the right to demur *ore tenus*, must pay the costs of the demurrer on the record. But in another case, the Court refused to give the plaintiff the costs of the demurrer on the record (*Brown* v. *Downes*, 11 Sim. 283), and see *Newton* v. *Earl of Egmont*, 4 Sim. 574; and now the general rule is that the defendant in such a case pays the costs of the demurrer on the record, and no order is made as to the costs of the demurrer *ore tenus;* see *Macintyre* v. *Connell*, 1 Sim. N. S. 257.

Time for demurrer.

3. A demurrer shall be delivered in the same manner (*e*) and within the same time (*f*) as any other pleading in the action.

(*e*) See Ord. XIX., rr. 6, 7, and notes.

(*f*) See Ord. XXII., as to times for pleading in defence, and XXIV. for pleadings in reply.

Where further time for defence given.

A defendant who has obtained an order extending the time within which to "deliver his defence" may demur within such extended time, *Hodges* v. *Hodges*, L. R. 2 C. D. 112, cited note (*b*), p. 497, *ante*.

Demurrer and defence in one pleading.

4. A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading (*g*).

Claiming same benefit as if demurrer had been put in.

(*g*) It has been held that a defendant putting in a defence to a demurrable bill, on the ground that it contains charges which ought to be answered, should claim the same benefit as if he had demurred (*Brace* v. *Taylor*, 2

Atk. 253; *Wray* v. *Hutchinson*, 2 My. & K. 235; *Milligan* v. *Mitchell*, 1 M. & Cr. 433, 446; but see *Nesbitt* v. *Berridge*, 9 Jur. N. S. 1044, 11 W. R. 446.

Bill demurrable but not demurred to.

In some of the older cases it was held that where a bill was dismissed at the hearing on a ground which might have been raised by demurrer, the bill would be dismissed *without costs*, *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; *Webb* v. *England*, 29 Beav. 44; following *Jones* v. *Davids*, 4 Russ. 277, 278; *Hill* v. *Reardon*, 2 Sim. & St. 489; but this rule is not now always followed. A defendant was held not to be justified in omitting to demur to a bill because it contained charges of fraud against him which he was desirous of answering, *Nesbitt* v. *Berridge*, 9 Jur. N. S. 1044.

Leave to plead as well as demur.

5. If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may, before demurring, apply to the Court or a judge for an order giving him leave to do so; and the Court or judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just (*h*).

(*h*) See 15 & 16 Vict. c. 76, s. 80; Chitty's Statutes, III., 735; *Manisty* v. *Kenealy*, 24 W. R. 919; and compare r. 12, *infra*.

Demurrer not entered for argument to be held sufficient.

6. When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately (*i*); and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered and notice thereof given within ten days (*k*) after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs (*l*) as if it had been allowed on argument.

Entering for argument.

(*i*) By the Registrar's Regulations of March 15, 1860 (under Cons. Ord. XIV. rr. 10, 11)—

2. Demurrers filed in causes attached to the Rolls Court are to be set down upon production of an order drawn up by the secretary to the Master of the Rolls.

3. Pleas and demurrers filed in causes attached to the Courts of the Vice-Chancellors are to be set down upon an order to be drawn up by the registrar on petition of course to the Lord Chancellor, and dated the day the petition is left. The petition (which does not require any fiat from the Lord Chancellor, nor any stamp) must state the day when the plea or demurrer was filed, and whether it be to the whole or part of the bill, and be subscribed by the solicitor in the form following, that is to say :—

A. B., Plaintiff's (*or* Defendant's) Solicitor.

1st March, 1860.

Order XXVIII.

(*k*) This rule follows Cons. Ord. XIV. rr. 14, 15, and the 4th of the Registrar's Regulations, *ubi. sup.*, except that there the time allowed for entering a demurrer to the whole bill was twelve days.

Reckoning the ten days.

As to allowing a demurrer to be set down after the twelve days had expired, see *Knight* v. *Marjoribanks*, 14 Sim. 198, where such an application, grounded on the alleged pecuniary embarrassments of the plaintiff's solicitor, of which the plaintiff was previously aware, was refused (see *Powell* v. *Corfield*, 7 Jur. 1124) ; and in *Matthews* v. *Chichester*, 11 Jur. 49, overruling s. c. 5 Hare, 207, the plaintiff, having neglected to comply with this rule, and his bill being consequently out of court, the Court refused to allow it to be restored.

Costs of demurrer submitted to.

(*l*) The order for these costs is now of course (*Jacobs* v. *Hooper*, 1 W. R. 61) ; see as to the effect of defendant's laches on the costs, *Campbell* v. *Joyce*, L. R. 2 Eq. 377.

Amendment while demurrer is pending.

7. While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless by order of the Court or a judge ; and no such order shall be made except on payment of the costs of the demurrer.

Costs of when demurrer allowed.

8. Where a demurrer to the whole or part of any pleading is allowed upon argument (*m*), the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs (*n*) of the demurrer.

Appeal from order allowing demurrer.

(*m*) A plaintiff may amend after demurrer allowed, and yet may appeal, *Lidbetter* v. *Long*, 4 M. & Cr. 285.

(*n*) As to costs of demurrer partially successful, see note (*r*), *infra*.

When demurrer to plaintiff's statement of claim allowed.

9. If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the Court to allow the statement of claim to be amended (*o*), shall pay to the demurring defendant the costs (*p*) of the action, unless the Court shall otherwise order.

When Court gives liberty to amend bill after demurrer is allowed.

(*o*) The Court would not generally give leave to amend after a general demurrer had been allowed (*Nowell* v. *Andover Railway Company*, 7 Jur. 839) ; but it was in the discretion of the Court to do so, *Wellesley* v. *Wellesley*, 4 M. & Cr. 558, per Lord Cottenham ; *Tyler* v. *Bell*, 1 Keen, 826 ; s. c. 2 M. & Cr. 89 ; *Sibson* v. *Edgeworth*, 2 De G. & S. 73 ; *Osborne* v. *Jullion*, 3 Drew. 596 ; *Tryon* v. *Westminster Improvement Commissioners*, 4 L. T. N. S. 203 ; *Rawlings* v. *Lambert*, 1 J. & H. 458 ; *Schneider* v. *Lizardi*, 9 Beav. 461, where it was said that the question was one to be determined "upon the facts appearing before the Court, upon the allegations in the bill, the limited admissions on the demurrer, and the nature and probability of the case." See *Holmes* v. *Waring*, 8 Price, 604, where leave was given.

Effect of demurrer allowed on injunction.

A demurrer *allowed* puts an end to a pending injunction, even though liberty to amend be given (*Schneider* v. *Lizardi*, 9 Beav. 461), but a demurrer was allowed without prejudice to a new bill (*Oriental Navigation Company* v. *Briggs*, 10 W. R. 125).

Demurrer allowed without costs.

(*p*) Under Cons. Ord. XIV. r. 13, which was substantially the same as the rule in the text, when the bill charged fraud and collision, a demurrer on the ground that the charges of fraud were too general, and that specific acts of fraud must be charged, was allowed without costs, on the ground

that by the demurrer the defendant had admitted the existence of fraud, *Bothomley* v. *Squire*, 1 Jur. N. S. 694); and see *Schneider* v. *Lizardi*, 9 Beav. 461, where it was held, notwithstanding this rule, that the costs of a demurrer were in the discretion of the Court, and that to some extent the statements in the bill, though admitted only for the purposes of the demurrer, would be regarded.

When a statement of claim alleged particular facts, which amounted practically to a charge of fraud against a particular defendant, such as any man of common sense would understand, but by the accidental omission of several facts the pleading was technically incomplete, a demurrer by the defendant was allowed without costs, but with leave to amend, and the costs were reserved (*Hodges* v. *Hodges*, 24 W. R. 293).

With costs of suit, including pending motions.

The order allowing a demurrer with costs, carries with it the costs of a pending motion, *Gladstone* v. *Ottoman Bank*, 1 N. R. 512. And where a motion for an injunction stood over at the request of a defendant who had then filed a demurrer, which was allowed on appeal, and plaintiff was ordered to pay the costs of the demurrer and the costs of suit, it was held that the costs incurred on the motion were costs of suit (*Finden* v. *Stevens*, 12 Jur. 319, overruling s. c. 11 Jur. 898).

Other pleadings to which demurrer is allowed to be struck out.

10. Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

Costs where demurrer is overruled.

11. Where a demurrer is overruled (*q*), the demurring party shall pay to the opposite party the costs (*r*) occasioned by the demurrer, unless the Court shall otherwise direct.

Appeal from order overruling demurrer.

(*q*) An order overruling a demurrer may be appealed from though the pleading is amended, *Jackson* v. *North Wales Railway Co.*, 13 Jur. 70, note; but see *Wellesley* v. *Wellesley*, 4 M. & Cr. 554.

Cons. Ord. XIV. r. 12.

(*r*) It was held under Cons. Ord. XIV. r. 12, which is substantially the same as this rule, that when a demurrer on two grounds failed as to one and succeeded as to another, no costs would be given (*Benson* v. *Hadfield*, 5 Beav. 546). On reversing an order allowing a demurrer the costs were ordered to be refunded (*Oats* v. *Chapman*, 1 Ves. S. 541).

Costs of demurrer partly successful.

Demurrer overruled with leave to plead.

12. Where a demurrer is overruled the Court may make such order and upon such terms as to the Court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to.

Entering demurrer for argument.

13. A demurrer shall be entered for argument by delivering to the proper officer * a memorandum of entry in the form No. 29 in Appendix (C.) † (*s*).

* See note (*b*), p. 440, *ante*.

† See Appendix, *post*.

(*s*) See Appendix of Forms, *post*.

Order XXIX.

ORDER XXIX.

Default of Pleading.

Dismissal for want of prosecution. * Ord. XXI. r. 1.

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time * allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution (*a*); and on the hearing of such application the Court or judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the Court or judge shall seem just.

Cons. Ord. XXXIII. 10, 13. What time will be given.

(*a*) Cons. Ord. XXXIII. 10—13, provided for dismissal of plaintiff's bill for want of prosecution under the old practice.

The Court will not now follow the old practice of giving a fortnight on payment of costs, but will give such time as is proper in each case, *Higginbotham* v. *Aynsley*, 24 W. R. 782, W. N. (1876) 187.

Signing judgment in default of defence. * *I.e.*, if he is bound to deliver a defence, *Hooper* v. *Giles*, W. N. (1876) 10.

2. "If the plaintiff's claim be only for a debt or liquidated demand, and "the defendant does not, within the time allowed for that purpose, deliver "a defence or demurrer,* the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs." (See 15 & 16 Vict. c. 76, s. 93; Chitty's Statutes, III. 737.)

Note.—The solicitor applying to enter final judgment in default of pleading, under Order XXIX. rules 2, 3, 7, and 8, or interlocutory judgment under rules 4, 5, and 8, must produce—

The Record and Writ Clerk's certificate of appearance, and the statement of claim, unless it appears by such certificate that the defendant did not require a statement of claim to be delivered.

If the statement of claim does not show the date of delivery (which must be eight clear days before judgment is entered, Ord. XXII. r. 1), the solicitor must indorse such date.—*Registrars' Instructions*, July, 1876.

Against one of several defendants.

3. "When in any such action as in the last preceding rule mentioned "there are several defendants, if one of them make default as mentioned "in the last preceding rule, the plaintiff may enter final judgment against "the defendant so making default, and issue execution upon such judgment "without prejudice to his right to proceed with his action against the other "defendants."

Default of defence to claim for detention of goods or damages. * Not specific chattels (Ord. XIII., r. 6, *ante*, p. 470).

4. "If the plaintiff's claim be for detention of goods * and pecuniary "damages, or either of them, and the defendant makes default as men-"tioned in rule 2, the plaintiff may enter an interlocutory judgment against "the defendant, and a writ of inquiry shall issue to assess the value of the "goods, and the damages, or the damages only, as the case may be. But "the Court or a judge may order that, instead of a writ of inquiry, the "value and amount of damages, or either of them, shall be ascertained in "any way in which any question arising in an action may be tried."

Where one of

5. "When in any such action as in rule 4 mentioned there are several "defendants, if one of them make default as mentioned in rule 2, the

" plaintiff may enter an interlocutory judgment against the defendant so several defendants makes default.
" making default, and proceed with his action against the others. And in
" such case, damages against the defendant making default shall be assessed
" at the same time with the trial of the action or issues therein against the
" other defendants, unless the Court or a judge shall otherwise direct."

Default of defence to claim for debt and detention of goods, &c.

6. " If the plaintiff's claim be for a debt or liquidated demand, and also
" for detention of goods and pecuniary damages, or pecuniary damages
" only, and the defendant makes default as mentioned in rule 2, the
" plaintiff may enter final judgment for the debt or liquidated demand, and
" also enter interlocutory judgment for the value of the goods and the
" damages, or the damages only, as the case may be, and proceed as men-
" tioned in rule 4."

Default of defence to action for recovery of land.

7. " In an action for the recovery of land, if the defendant makes
" default as mentioned in rule 2, the plaintiff may enter a judgment that
" the person whose title is asserted in the writ of summons shall recover
" possession of the land, with his costs."

Mesne profits and damages for breach of contract.

8. " Where the plaintiff has endorsed a claim for mesne profits, arrears
" of rent, or damages for breach of contract upon a writ for the recovery of
" land, if the defendant makes default as mentioned in rule 2, or if there
" be more than one defendant, some or one of the defendants make such
" default, the plaintiff may enter judgment against the defaulting defen-
" dant or defendants and proceed as mentioned in rules 4 and 5."]

[9. Applies only to Probate actions.] Probate.

Motion for judgment in default of defence;

10. In all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to (*b*).

(*b*) The practice of filing a traversing note where a defendant made default in pleaping under Cons. Ord. XIII. is obsolete, note (*n*), p. 492, *ante*.

Motions for judgment go into the general paper, but may be heard short, see note to Ord. XL. r. 1. See also *Roupell* v. *Parsons*, 24 W. R. 269; *Meakin* v. *Sykes*, *ibid.* 293; *Gillott* v. *Kerr*, *ibid.* 428. And as to district registry actions, see *Walker* v. *Robinson*, *ibid.* 137, 427, and Ord. XXXV., *post*.

against one of several defendants;

11. Where, in any such action as mentioned in the last preceding rule, there are several defendants, then, if one of such defendants make such default as aforesaid (*c*), the plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants (*d*).

(*c*) Where the plaintiff had a right to take a bill *pro confesso* against a husband, he had also a right to take it *pro confesso* against his wife, if both

against husband

Order XXIX.

making default in pleading; against other defendants.

were defendants, and there was no order for the wife to answer separately (*Alexander* v. *Osborne*, 11 Jur. 414; and see *Lee* v. *Cottle*, 3 M. & Cr. 180; *Tooke* v. *Clarke*, Dick. 350; and where a husband and wife put in a defence which was the wife's defence only, the husband was held liable for default, *Jenkins* v. *Davies*, L. R. 1 C. D. 696).

As to taking a bill *pro confesso* against the Attorney-General, see *Peto* v. *Attorney-General*, 1 Y. & J. 509; against a corporation, *Brickwood* v. *Harvey*, 8 Sim. 201; against privileged persons, *Logan* v. *Grant*, 1 Madd. 626; *Jones* v. *Davis*, 17 Ves. 368; against a defendant under sentence for felony, *Rogers* v. *Kirkpatrick*, 3 Ves., jun. 573.

Motion for judgment against defendants *not* in default.

(*d*) The motions for judgment against the other defendants who put in a defence will be under Ord. XL. r. 11, see *Re Smith*, *Bridson* v. *Smith*, W. N. (1876) 103, 24 W. R. 392.

Where pleadings closed last pleading is admitted.

12. If the plaintiff does not deliver a reply or demurrer or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted (*e*).

(*e*) But see *Earp* v. *Henderson*, cited in note to Ord. XXV. p. 501, *ante*.

Where person added by counter-claim makes default. * Ord. XXII. r. 8.

13. In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading,* the opposite party may apply to the Court or a judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

Setting aside judgment by default.

14. Any judgment by default, whether under this order or under any other of these rules, may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such Court or judge may think fit.

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ORDER XXX.

Payment into Court in Satisfaction.

When payment into Court in satisfaction may be made,

1. Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his his defence, or by leave of the Court or a judge at any

later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court (*a*) shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

Order XXX. and pleaded in defence.

(*a*) Payment into Court in urgent cases, and especially in injunction suits, is provided for by r. 31 of Chancery Funds Rules, p. 404, *ante*; see *Brand* v. *Blow*, 43 L. J. Ch. 528.

Chancery Funds Rules r. 12.

2. Such sum of money shall be paid to the proper officer,* who shall give a receipt for the same. If such payment be made before delivering his defence the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the form No. 5 in Appendix (B) hereto.†

How payment to be made.

* See note (*b*), p. 440.

† See Appendix of forms, *post*.

3. Money paid into Court as aforesaid may, unless otherwise ordered by a judge, be paid out to the plaintiff, or to his solicitor on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority unless specially required by the officer of the Court.

Payment out to plaintiff.

4. The plaintiff, if payment into Court is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the form No. 6 in Appendix (B) hereto,‡ and shall be at liberty in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed (*b*).

Acceptance by plaintiff in satisfaction.

‡ Appendix of forms, *post*.

Costs.

(*b*) This rule is subject to Ord. LV., by which costs are placed in the discretion of the Court, *Broadhurst* v. *Willey*, W. N. (1876) 21.

As to costs where a defendant obtains the dismissal of the suit having been all along ready to concede the plaintiff's demand, see *Rudd* v. *Rowe*, L. R. 10 Eq. 610.

Discretion as to costs.

Order XXXI.

ORDER XXXI.

Discovery and Inspection.

Interrogatories for examination of opposite party.

1. The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time (*a*) not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose (*b*), and either party may at any time (*c*) by leave of the Court or a judge, deliver (*d*) interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose (*e*).

By plaintiffs, before statement of defence is received.

(*a*) It has been said that the interrogatories should not be delivered before the statement of defence is received, for they may then be unnecessary, *Strong* v. *Tappin*, W. N. (1876) 22; see, too, *Cashin* v. *Craddock*, L. R. 2 C. D. 140, 146; but in *Mercier* v. *Cotton*, 24 W. R. 567, it was held that a plaintiff has a *primâ facie* right to deliver them with his statement of claim, but the defendant may then have them struck out unless the plaintiff can at that stage of the action show that they are material.

By defendant after statement of defence (15 & 16 Vict. c. 86, s. 19).

(*b*) By 15 & 16 Vict. c. 86, s. 19, a defendant might *after answer* file a concise statement and interrogatories, and now by this rule he may deliver interrogatories, but not before his defence, *Disney* v. *Langbourne*, 2 L. R. Ch. Div. 704.

Where defendant in contempt.

Even though a defendant is in contempt for non-compliance with orders of the Court, he is entitled to take any steps required for the purposes of his defence; and where a defendant being in contempt for not having made an affidavit as to documents, applied for an order that the plaintiff should make an affidavit of documents, James, V.-C., held he was entitled to the order, but the affidavit and production by the plaintiff were to be after an affidavit and production by the defendant, *Haldane* v. *Eckford*, L. R. 7 Eq. 425.

When by leave of Court.

(*c*) This seems to mean at any time after the close of the pleadings; see *Disney* v. *Langbourne*, L. R. 2 C. D. 704, 45 L. J. Ch. Div. 532, 24 W. R. 663, where Jessel, M. R. refused to allow a defendant to deliver interrogatories before his defence was put in.

Delivery.

(*d*) In *Bowen* v. *Price*, 2 D. M. G. 899, overruling s. c. 1 Drew. 307, it was held that a copy of the interrogatories left at the office of the defendant's solicitor was *delivered*.

(*e*) See *Newall* v. *Telegraph Company*, L. R. 2 Eq. 756; *Warden* v. *Peddington*, 32 Beav. 639.

Costs of improper interrogatories.

2. The Court in adjusting the costs of the action shall, at the instance of any party, inquire or cause inquiry to be

made into the propriety of exhibiting such interrogatories and if it is the opinion of the taxing-master or of the Court or judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs* occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault. Order XXXI.

* See note (*b*), p. 488, *ante*.

3. Interrogatories may be in the form No. 7 in Appendix (B) hereto,* with such variations as circumstances may require (*f*). Form of interrogatories.

(*f*) See Appendix of forms, *post*.
The interrogatories should relate to matters of fact not of law or interpretation ; see *Hoffmann* v. *Postill*, L. R. 4 Ch. 673.

4. If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly (*g*). Interrogating officer, &c., of corporations.

(*g*) See 17 & 18 Vict. c. 125, s. 51, Chitty's Statutes, vol. III. 778.
Formerly in Chancery the officers of a plaintiff corporation could not be interrogated where they were not personally defendants or plaintiffs, *Imperial Mercantile Credit Association* v *Whitham*, 3 L. R. Eq. 89 ; see *United States of America* v. *Wagner*, L. R. 3 Eq. 725, 2 Ch. 582 ; *Republic of Peru* v. *Weguelin*, L. R. 20 Eq. 140 ; *Republic of Costa Rica* v. *Erlanger*, 33 L. T. N. S. 632 ; 24 W. R. 109. As to obtaining discovery from a foreign Government suing a plaintiff, see *Prioleau* v. *United States*, L. R. 2 Eq. 659 ; so where discovery as to documents was sought from a company or corporation, the secretary or officer of the company had to be made a defendant for the purpose of taking out a summons against him ; *Ranger* v. *Great Western Railway Company*, 4 De G. & J. 74 ; and see *Law* v. *London Indisputable Policy Company*, 10 Hare, App. xx., where the clerk of a company stated in his affidavit that all the documents were in the possession of the warden, and that he could not inspect them without the warden's permission, it was held that the affidavit was insufficient, *Attorney-General* v. *Mercer's Company*, 9 W. R. 83. A secretary made a party for discovery could not evade discovery by resigning his situation after the filing of the bill, *Acomb* v. *Landed Estates Company*, 14 W. R. 387 ; and see *Carew* v. *Davis*, 21 Beav. 213. Under a winding-up, in a contest between the company and an alleged contributory, the official liquidator was held to be in the same position as if on a bill filed against the company, he had been made a defendant for purposes of discovery, *Re Barned's Banking Company*, L. R. 2 Ch. 350 ; see *Re Contract Corporation*, L. R. 7 Ch. 207.

Discovery from foreign government.

Practice where production sought from company.

Order XXXI

Striking out interrogatory.

5. Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous (*h*) or irrelevant (*i*), or is not put *bonâ fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground (*k*). And the judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.

If objectionable in substance.

(*h*) As to scandal see note (*c*) to Ord. XXVII. r. 1, p. 503, *ante*.

(*i*) As to irrelevancy, see note to r. 7, *infra*. If interrogatories are filed before a defence is put in the plaintiff must show their materiality at that stage of the action (see note to r. 1) or they may be struck out, *Mercier* v. *Cotton*, L. R. 1 Q. B. Div. 445, 24 W. R. 566.

If discovery privileged.

(*k*) If an interrogatory is *bad in substance* application should be made to strike it out under this section. If it is objected that the discovery is *privileged* such objection should be taken under r. 8, *Voysey* v. *Cox*, W. N. (1876) 12.

Time for answering.

6. Interrogatories shall be answered by affidavit to be filed within ten days (*l*) or within such other time as a judge may allow (*m*).

Wife answering separately.

(*l*) Where a *wife* obtains an order to *answer separately* for her husband, her time for answering ought, it seems, to run only from the date of the order, see *Jackson* v. *Haworth*, 1 S. & S. 161.

Extension of time.

(*m*) For the form of order to extend the time, see *Weston* v. *Cohen*, W. N. (1869) 74.

The first application is not of course, but must be supported by affidavit (*Brown* v. *Lee*, 11 Beav. 162); but under theold practice the statement of counsel as to the time required by him was generally accepted (*Byng* v. *Clark*, 13 Beav. 92, where the time for answering was enlarged on five successive occasions).

Form of answer.

* Ten was substituted for [three] by r. 11 of June, 1876.

7. An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding ten * folios, be printed (*n*), and may be in the form No. 8 in Appendix (B) hereto, with such variations as circumstances may require (*o*).

(*n*) See further as to printing, Additional Rules, Orders I—V., August, 1875, *post*.

Cons. Ord. XV., rr. 5, 6.

(*o*) Compare Cons. Ord. XV. rr. 5, 6, which provide as follows :—

Answer.

All answers shall be signed by the parties swearing the same, and such signature shall be affixed or acknow-

ledged in the presence of the persons before whom the same are sworn.

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As to the answer of an illiterate person, see *Wilton* v. *Clifton*, 2 Hare, 535.

Unless the Court shall otherwise direct, the answers of all persons (except persons entitled to the privilege of peerage, or corporations aggregate) shall be put in upon the oath of the parties putting in the same, where they are not exempted from taking an oath by any statute in that behalf. Persons entitled to the privilege of peerage may answer upon protestation of honour, and corporations aggregate shall put in their answer under their common seal

On oath.

Peers.

Corporations.

8. Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit (*p*).

Objection to answer.

(*p*) This rule corresponds with Cons. Ord. XV. r. 4. Under the new practice the right to discovery is regulated by the rules previously existing in the Court of Chancery, *Anderson* v. *Bank of British Columbia*, L. R. 2 Ch. Div. 644; *Bustros* v. *White*, 45 L. J. Q. B. Div. 642.

Privilege regulated by Chancery rules.

The general rules as to privilege (which are applicable also to the protection of documents from discovery, *Clegg* v. *Edmondson*, 22 Beav. 125, 137; *Rajah of Coorg* v. *East India Company*, 2 Jur. N. S. 407), are as follows:—

Privilege.

A person is not compelled to make discovery of—

(1) Communications between him and his solicitor or professional adviser, relating to the matter in litigation, and in anticipation of the claim which is being litigated, *Paddon* v. *Winch*, L. R. 9 Eq. 666, though no litigation had arisen at the time they were written, *Ford* v. *De Pontes*, 7 W. R. 299; *Lawrence* v. *Campbell*, 4 Drew. 485; *Simpson* v. *Brown*, 33 Beav. 482; *Turton* v. *Barber*, L. R. 17 Eq. 329; *Minet* v. *Morgan*, L. R. 8 Ch. 361; *Smith* v. *Daniell*, L. R. 18 Eq. 649; *Skinner* v. *G. Northern Ry.*, 43 L. J. Ex. 150; *Macfarlan* v. *Rolt*, L. R. 14 Eq. 580; *Wilson* v. *Northampton Ry.*, *ibid.* 477; *M'Corquodale* v. *Bell*, 45 L. J. C. P. 329; *Bustros v. White*, 45 L. J. Ch. Div. 42; 24 W. R. 721; communications with a former solicitor, *Marriott* v. *Anchor, &c., Company*, 3 Giff. 304 (but see *Patch* v. *Ward*, L. R. 1 Eq. 436); see particularly the remarks in *Ross* v. *Gibbs*, L. R. 8 Eq. 522; and of Jessel, M. R., in *Anderson* v. *Bank of British Columbia*, L. R. 2 Ch. Div. 644; 24 W. R. 624. Counsel's drafts and briefs, and cases laid before them are protected, *Nicoll* v. *Jones*, 2 H. & M. 588; except so far as the indorsements, &c., thereon were matters *publici juris*, *Walsham* v. *Stainton*, 2 H. & M. 1; *Plumley* v. *Horrell*, W. N. (1868) 240; as to arbitrations, see *Ponsford* v. *Swayne*, 1 J. & H. 433; and as to compromises of former suits, see *Hutchinson* v. *Glover*, L. R. 1 Q. B. Div. 138.

(1) Communications with professional advisers,

Communications with a solicitor out of the jurisdiction, *Lawrence* v. *Campbell*, 4 Drew. 485, or the solicitor's clerk, or an accountant or skilled person employed by the solicitor are within the principle, *Steele* v. *Stewart*, 1 Ph. 471; *Churton* v. *Frewin*, 2 Dr. & Sm. 390; *Hooper* v. *Gumm*, 10 W. R. 644. So too an application addressed

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and their agents.

by defendants to their agents abroad by direction of their solicitor for the purpose of procuring evidence in support of their case, *Lafone* v. *Falkland Islands Co.* (No. 1), 4 K. & J. 34. But whether the privilege extends to communications with the agent of the solicitor, not alleged to have been written in consequence of communications with the solicitor, is doubtful, *Hooper* v. *Gumm* (*ubi sup.*); but see *Jenkyns* v. *Bushby*, 2 L. R. Eq. 547; it does not extend to communications made to the solicitor but not in his character of solicitor, *Thomas* v. *Rawlings*, 27 Beav. 140; and see *Hampson* v. *Hampson*, 26 L. J. Ch. 612; nor to letters passing between the defendant and third parties or their agents (*English* v. *Tottie*, L. R. 1 Q. B. D. 141), nor to letters passing between co-defendants, *Betts* v. *Menzies*, *ibid.* 528, but see *Hamilton* v. *Nott*, L. R. 16 Eq. 112; nor to information which the solicitor has derived from collateral sources, not directly from the client, *Marsh* v. *Keith*, 1 Dr. & Sm. 342; *Ford* v. *Tennant*, 32 Beav. 162; *Re Land Credit Society*, 15 W. R. 703; *Page* v. *Ward*, W. N. (1869) 51; *Anderson* v. *Bank of British Columbia*, L. R. 2 Ch. Div. 644; 24 W. R. 624.

Made for the purpose of the suit;

unless the client makes no objection,

The privilege is the privilege of the client, and the solicitor cannot object to produce if his client does not or cannot claim privilege, *Re Cameron's Coalbrook Railway Company*, 25 Beav. 1; thus, where a ward of Court was keeping out of the way the solicitor had to give all information he could to aid in finding her, *Ramsbotham* v. *Senior*, L. R. 8 Eq. 575. As to cases between trustee and *cestui que trust*, see *Bacon* v. *Bacon*, 34 L. J. Ch. N. S. 349.

or the communication was for the benefit of both parties;

Professional opinions given partly for the benefit of the party requiring production are not privileged, *Reynolds* v. *Godlee*, 4 K. & J. 88; *Talbot* v. *Marshfield*, 13 W. R. 885; *Wynne* v. *Humberston*, 27 Beav. 421; on appeal, 32 L. T. 306.

or fraud is charged;

Where fraud is charged no privilege can be claimed for documents relating to the alleged fraud, *Phillips* v. *Holmer*, 15 W. R. 578; *Feaver* v. *Williams*, 11 Jur. N. S. 902; but see *Mornington* v. *Mornington*, 2 J. & H. 697; *Charlton* v. *Coombes*, 4 Giff. 372.

(2) tending to criminate.

(2) Matters tending to criminate: see *Walters* v. *Earl of Shaftesbury*, 14 W. R. 259; *Howes* v. *McKernan*, 30 Beav. 547; *U. S. of America* v. *McRae*, L. R. 4 Eq. 337; *Villeboisnet* v. *Tobin*, L. R. 4 C. P. 184; *Hill* v. *Campbell*, L. R. 10 C. P. 222; but it is not the practice to allow either of the statutes of Elizabeth to be an excuse for resisting discovery, *Bunn* v. *Bunn*, 12 W. R. 561.

(3) Irrelevant.

(3) Documents, &c., which manifestly have no bearing on the issue to be tried, or which relate exclusively to the defendant's own title, or to the evidence by which his case is to be established: *Daw* v. *Eley*, 2 H. & M. 725; *Ingilby* v. *Shafto*, 33 Beav. 31; *Commissioners of Sewers* v. *Glasse*, L. R. 15 Eq. 302.

Where right depends on the issue of the actions.

For cases where the right to discovery depends on the main question at issue in the action, so that if the plaintiff succeeds he will have the discovery as part of the relief, see r. 19, *post*, and cases there cited, note (*a*), p. 525, *post*.

Documents relating only to defendant's title.

The party refusing production must show that the documents in question relate to his title and do not relate to the plaintiff's title, *Clegg* v. *Edmondson*, 3 Jur. N. S. 299; *Lind* v. *Isle of Wight Ferry Company*, 8 W. R. 540; *Bishop of Winchester* v. *Bowker*, 29 Beav. 479; *Felkin* v. *Lord Herbert*, 9 W. R. 756; *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88; *Jenkyns* v. *Bushby*, 14 W. R. 531. Thus a purchaser without notice of a fee simple estate need not produce his title-deeds to the mortgagee of a term, *Hunt* v. *Elmes*, 27 Beav. 62. But a defendant cannot refuse production merely on the ground that if the plaintiff's claim is unfounded, he has no interest in them, *Gresly* v. *Mousley*, 2 K. & J. 288; and see *Rumbold* v. *Forteath*, 3 K. & J. 44; *Ferrier* v. *Atwool*, 14 W. R. 597; *Bugden* v. *South*, 26 L. J. Ch. 425; *Bates* v. *Master of Christ's College*, *Cam-*

bridge, ibid., 449; *Quin* v. *Ratcliff*, 9 W. R. 65; but see *Robson* v. *Flight*, 33 Beav. 268. Production of the court rolls of a manor was ordered in a suit to establish a custom, *Warrick* v. *Queen's College*, L. R. 3 Eq. 683.

Mortgagee's title deeds;

A mortgagee need not produce the mortgage deed until he is paid what is due, *Chichester* v. *Donegall*, L. R. 5 Ch. 497; see, however, *Patch* v. *Ward*, L. R. 1 Eq. 436, and observations of Lindley, J., W. N. (1876) 27; *Jones* v. *Jones*, Kay, App. vi.: *Bridgewater* v. *De Winton*, 12 W. R. 40; *Howard* v. *Robinson*, 4 Drew. 526; *Weeks* v. *Stourton*, 13 W. R. 489; *Freeman* v. *Butler*, 33 Beav. 289; *Smith* v. *Barnes*, 1 L. R. Eq. 65; Fisher on Mortgages, 340.

(4) Relating to other party's mode of conducting his case.

(4) Documents relating only to the conduct of the case, *Ingilby* v. *Shafto*, 33 Beav. 31; *Gandee* v. *Stansfield*, 4 De G. & J. 1; *Peile* v. *Stoddart*, 1 M. & G. 192; *Turner* v. *Burkenshaw*, 11 W. R. 851.

9. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a judge on motion or summons.

Sufficiency of answer how determined.

10. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further, as the case may be (*q*). And an order may be made requiring him to answer or answer further either by affidavit or by *viva voce* examination, as the judge may direct.

Order for further answer.

Application in chambers.

(*q*) The application should be in chambers, see *Chesterfield, &c., Co.* v. *Black*, 24 W. R. 783.

Costs where answer insufficient.

Under the old practice whether exceptions were allowed (*Newton* v. *Dimes*, 3 Jur. N. S. 583), or overruled (*Stent* v. *Wickens*, 5 De G. & Sm. 384), the costs followed the result (comp. *Willis* v. *Childe*, 13 Beav. 454); and such costs were payable immediately (*Thomas* v. *Rawlings*, 27 Beav. 375). But it was said that they should be *asked for* by the successful party (*Earp* v. *Lloyd*, 4 K. & J. 58; *Crossley* v. *Stewart*, 2 N. R. 57). But where an interrogatory included several questions which ought to have been distinct, and exceptions as to such interrogatory were only partly allowed, the defendant had not to pay costs, *Langton* v. *Waite*, 15 W. R. 53.

Where some exceptions were allowed and others overruled, the costs of those allowed were set off against those overruled (*Willis* v. *Childe, loc. cit.*, *Dally* v. *Worhan*, 32 Beav. 69.

Order for production of documents.

11. It shall be lawful for the Court or a judge at any time during the pendency (*r*) therein of any action or proceeding to order the production by any party thereto, upon oath, of such of the documents in his possession or power (*s*) relating to any matter in question (*t*) in such action or proceeding, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just (*u*).

Defendant not ordered

(*r*) Bacon, V.-C., refused to order such production at the instance of a plaintiff who had not filed a statement of claim, *Cashin* v. *Craddock*, L. R.

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to produce documents before plaintiff files statement of claims.

2 C. D. 140, and it seems that discovery will not generally be enforced before the statement of claim is delivered, *ibid.*; *Ley* v. *Marshall*, W. N. (1876) 33; and compare note (*v*) to next rule as to the practice not to order discovery at the instance of any party who has not a *primâ facie* title.

An order may be made to produce documents for the purpose of an appeal, *Re National Funds Assurance Co.*, W. N. (1876) 192.

Production for purpose of appeal.

In his *possession or power.*

Possession of agent.

Solicitor's lien.

(*s*) A party must produce relevant documents in the possession of his solicitor or agent, and cannot refuse because the solicitor says they are irrelevant, unless he himself has inspected them, *M'Intosh* v. *Great Western Railway Company*, 4 D. M. G. 544; *Manby* v. *Bewicke* (3), 8 D. M. G. 476; nor can the solicitor refuse, because he claims his ordinary lien, *Lockett* v. *Carey*, 10 Jur. N. S. 144; *Hope* v. *Liddell*, 7 D. M. G. 331; *Re Cameron's Coalbrook Railway Company*, 25 Beav. 1; see *Re Gregson*, 26 Beav. 87; *North* v. *Huber*, 29 Beav. 437; *Vale* v. *Oppert*, L. R. 10 Ch. 340; *Belany* v. *French*, 29 L. T. N. S. 706; and cases, *infra*, on documents in pawn. If they are the agent's private property they need not be produced, *Colyer* v. *Colyer*, 9 W. R. 452; but see *Bishop of Winchester* v. *Bowker*, *ibid.* 404.

Documents abroad.

Where the documents ordered to be produced are in a foreign country, the party required to produce them must show not only that it would be difficult to obtain them, but that he has tried and failed, *Mertens* v. *Haigh*, 11 W. R. 792; and as to documents abroad, see *Freeman* v. *Fairlie*, 3 Mer. 44.

Where stranger to the suit has possession,

Documents in the possession of a stranger to the suit previously to its institution cannot be ordered to be produced in his absence, *Burbridge* v. *Robinson*, 2 M. & G. 244, see *Bovill* v. *Cowan*, 18 W. R. 533; and if such person has covenanted to produce the documents for the maintenance and justification of the title of a party to the suit, he cannot be ordered to produce them in a suit hostile to such party, *Bethell* v. *Casson*, 1 H. & M. 806; but full information must be given as to the nature of such documents (see p. 521, *infra*).

or joint interest.

Similarly, where a person, not a party to the suit, has a joint interest in the documents (*Edmonds* v. *Foley*, 30 Beav. 282; *Bayley* v. *Cass*, 10 W. R. 370; *Ford* v. *Dolphin*, 1 Dr. 222; *Lord Eglinton* v. *Lamb*, 14 W. R. 170), the documents will probably be protected, but full information must be given in the affidavit, *Bovill* v. *Cowan*, 39 L. J. Ch. 768, and see observations of Lord Cottenham in *Taylor* v. *Rundell*, Cr. & Ph. 104, 111. Thus, directors of a company could not be ordered to produce documents in which other directors had a joint interest, *Penney* v. *Goode*, 1 Dr. 474; *Reid* v. *Langlois* 1 M. & G. 627; *Lazarus* v. *Mozley*, 5 Jur. N. S. 1120; *Hadley* v. *Macdougall* L. R. 7 Ch. 312; but cf. *Plant* v. *Kendrick*, L. R. 10 C. P. 692; and see now Ord. XVI. as to Parties. And see, for other cases of joint interest,

Documents in pawn.

e.g., where the documents had been pawned before the institution of the suit, and the defendant was too poor to redeem them, *Liddell* v. *Norton*, Kay, App. xi.; *Re Williams*, 7 Jur. N. S. 323; *North* v. *Huber*, 2 Beav. 437.

Third party's interest.

But where a defendant had in his possession letters written to him by a person not party to the suit, which were admitted to be material, he was compelled to produce them, though they were marked "private and confidential," and though the sender objected to the production, *Hopkinson* v. *Lord Burleigh*, L. R. 2 Ch. App. 447, 15 W. R. 543, where Lord Cairns, L. J. said, "the sender of the letter must be supposed to have given an authority to the receiver to use it for every lawful purpose, and it has been held that publication is not such a lawful purpose. But if there can be one purpose more lawful than another, it would be to produce the letter in a court of justice for the furtherance of the ends of justice," see *Penkethman* v. *White*, 2 W. R. 380; *Lee* v. *Hammerton*, 12 W. R. 975, where the report of a medical officer of an insurance company being material, had to be

Private letters.

produced, though confidential. An undertaking not to use the letters for any collateral purpose must be given in such a case, *Hopkinson* v. *Lord Burleigh*, *ubi sup.*; *Richardson* v. *Hastings*, 7 Beav. 354; and generally when the plaintiff obtains an order for production and inspection of docu-

ments, he does so upon an implied undertaking not to make public any information so obtained, or to communicate such information to persons not parties to the suit (*Williams* v. *The Prince of Wales Assurance Company*, 23 Beav. 338); and, it seems, the Court would grant an injunction to restrain him from so doing (*ibid*). See, too, *Reynolds* v. *Godlee*, 4 K. & J. 88; and *Enthoven* v. *Cobb*, 5 De G. & Sm. 595; on appeal, 2 D. M. G. 632; *Bowen* v. *Pearson*, 11 W. R. 819; *Hutchinson* v. *Glover*, L. R. 1 Q. B. Div. 138.

What information must be given as to protected documents.

Where a co-defendant has an interest in the document scheduled, he should be served with the summons to produce, *Gresley* v. *Mousley*, 2 K. & J. 288; even if the Court should hold that there are grounds for not ordering production of the documents on account of a third person's interest therein, still the party must give all the information in his power as to such documents as he has partial possession of, and make discovery of their contents so far as they are material, *Taylor* v. *Rundell*, Cr. & Ph. 104; *Bovill* v. *Cowan*, 15 W. R. 608; *Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271.

And as to the expense of getting such information, see *Bethell* v. *Casson*, 1 H. & M. 806.

Relating to matters in question.

(*t*) As to relevancy, see note (*p*), *supra*. It has been doubted whether a document required only for comparison of handwriting is a relevant document, *Wilson* v. *Thornbury*, L. R. 17 Eq. 127.

(*u*) See the cases on production of documents, note (*p*), *supra*. Unless privilege is claimed, the judge has no jurisdiction to inspect the documents, and in his discretion to refuse an order for production, *Bustros* v. *White*, 24 W. R. 721.

Order for affidavit as to documents.

12. Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery (*v*) on oath of the documents which are or have been in his possession or power (*w*), relating to any matter in question in the action.

Party applying must make *primâ facie* case.

(*v*) See note (*r*) to last rule as to not allowing discovery at the instance of a plaintiff who has not made a *primâ facie* case by filing a statement of claim.

Where administration to an intestate's estate had been granted to the solicitor to the treasury, and subsequently an alleged next of kin instituted a suit and asked discovery as to documents, it was held that the affidavit as to documents need not be made until a *primâ facie* case had been made by the plaintiff, *Lane* v. *Gray*, L. R. 16 Eq. 552.

When affidavit must be made.

The defendant must make the affidavit, though he insists that he cannot be compelled to produce any documents, for the question of liability to production is distinct from the question of sufficiency of affidavit, *Rumbold* v. *Forteath*, 3 K. & J. 44; *Lazarus* v. *Mozley*, 5 Jur. N. S. 1119; *Nicoll* v. *Jones*, 13 W. R. 451; and comp. *Taylor* v. *Rundell*, Cr. & Ph. 104, 111; *Fortescue* v. *Fortescue*, 24 W. R. 945; see too as to the necessity of making the affidavit, *Manby* v. *Bewicke*, 27 L. T. 55; *Quin* v. *Ratcliff*, 9 W. R. 65; *Hanslip* v. *Kitton*, 1 D. J. S. 440; *Evans* v. *Louis*, L. R. 1 C. P. 656.

Order is to produce documents admitted by affidavit.

The order is in the form that the plaintiff, his solicitor or agent, may be at liberty to inspect and peruse such documents admitted by the defendant as he may not by his affidavit object to produce, and to take copies thereof and extracts therefrom as he shall be advised at his own expense, *Mertens* v. *Haigh*, Johnson, 738; as to the form of the affidavit, see *Woodhatch* v. *Freeland*, 11 W. R. 398; *Newall* v. *Telegraph Company*, L. R. 2 Eq. 756; *Minet* v. *Morgan*, L. R. 8 Ch. 361; *Corporation of Hastings* v. *Ivall*, *ibid.*, 1017; *Taylor* v. *Oliver*, W. N. (1876) 241.

Form of affidavit.

No cross-examination on it.

There can be no cross-examination on the affidavit as to documents, *Manby* v. *Bewicke* (2), 8 D. M. G. 470; *Newall* v. *Telegraph Company*, L. R. 2 Eq. 756; *Alcock* v. *Gill*, W. N. (1869) 270; nor can counter affidavits be filed, *Westminster, &c., Company* v. *Clayton*, 12 W. R. 123; except as to irrelevant matter introduced into the affidavit, *Underwood* v. *Secretary for*

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India, 14 W. R. 551; see *Lamb* v. *Orton*, 1 Drew. 414; *Wing* v. *Harvey*, 1 Sm. & G. App. x.

And where the documents in question, though stated in the bill, were neither admitted nor denied by the answer, the plaintiff was allowed to verify such documents by affidavit (*Addis* v. *Campbell*, 1 Beav. 258).

Affidavit insufficient (*a*) in point of distinctness;

If the affidavit is insufficient in the sense of not giving a full and distinct description of the documents admitted (see *Rumbold* v. *Forteath*, 3 K. & J. 44), the remedy is to take out a summons to consider the sufficiency, *Lazarus* v. *Mosely*, 5 Jur. N. S. 1110.

(*b*) by omitting relevant documents;

If the affidavit is inconsistent with the pleadings or a reasonable suspicion founded on the pleadings and affidavits (*Wright* v. *Pitt*, L. R. 3 Ch. 809; *A.-G.* v. *Castleford Board*, 21 W. R. 117; *Saull* v. *Browne*, L. R. 17 Eq. 402) exists that documents relating to the matters in issue are omitted, or that the defendant is claiming to protect documents which he ought to produce, the remedy is to take out a further summons requiring the defendant to state whether he has a particular document or class of documents in his possession, *Westminster Brymbo, &c., Company* v. *Clayton*, 12 W. R. 123; *Noel* v. *Noel*, 1 D. J. S. 468, 11 W. R. 588, 791; *Caton* v. *Lewis*, 22 L. J. Ch. 946; *Bowes* v. *Fernie*, 3 M. & C. 632; *Catt* v. *Towle*, 18 W. R. 966; *Thorpe* v. *Satcliffe*, 39 L. J. Ch. 712; *Cocq* v. *Hunasgeria Coffee Company*, L. R. 4 Ch. 415; or, as the case may be, requiring him to produce the documents which he improperly claims to protect, *Nicholl* v. *Jones*, 13 W. R. 451; *Lafone* v. *Falkland Islands Company*, 2 K. & J. 276; *Greenwood* v. *Greenwood*, 6 W. R. 119. It seems, however, that before the Court will direct a further affidavit to be made, the party making the affidavit must have made some admission discrediting it; *Wright* v. *Pitt*, *ubi. sup.*, and other cases cited above.

As to the *subpœna* for production of documents before the examiner, see note (*v*), p. 183, *ante*; and at the hearing, *Griffith* v. *Ricketts*, 7 Hare, 301.

(*w*) It is not the practice to make an order for discovery against the solicitor of a party from whom discovery is sought, *Cashin* v. *Craddock*, L. R. 2 C. D. 140.

Affidavit as to documents.

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the form No. 9 in Appendix (B) hereto,* with such variations as circumstances may require (*x*).

* Appendix of forms, *post*.

(*x*) See *Taylor* v. *Oliver*, 34 L. T. N. S. 902.

Notice to party to produce for inspection document referred to in his pleadings.

14. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any documents (*y*), to produce such document for the inspection (*z*) of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his

own title (*z*), he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

Discovery of documents pleaded.

(*y*) See *Hardman* v. *Ellames*, 5 Sim. 640, criticised in Wigram on Discovery, ed. 1836, pp. 121—144, approved in *Adams* v. *Fisher*, 3 My. & Cr. 526, 548.

(*z*) See Cons. Ord. XLII. rr. 3, 4, which provide as follows :—

Depositing documents for inspection (Cons. Ord. XLII. rr. 3, 4).

Where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers or otherwise, the same shall be left or deposited in the Record and Writ Clerks' Office, and shall be subject to such directions as may be given for the production thereof.

The course of procedure in use as to the production of documents ordered to be produced before the hearing of a cause, shall extend and be applied to the production of documents ordered to be produced after the hearing of any cause or matter.

Costs of unnecessary inspection.

The costs of an inspection of documents and the notice to produce, when the inspection was unnecessary, are not to be allowed, see Additional Rules (as to Costs), August, 1875 (*post*).

When production ordered at place of business.

The Court will allow production at the defendant's place of business, if he states that the documents are in constant and necessary use in his business, *Grane* v. *Cooper*, 4. M. & C. 263 ; see *Mertens* v. *Haigh*, Johns, 735 ; but it is not sufficient, to show that the books, &c., are in constant use, without also stating that they cannot be removed without inconvenience, *Hooper* v. *Gumm*, 2 J. & H. 602 ; *A.-G.* v. *Whitwood Local Board*, 19 W. R. 1107. And production is frequently ordered at the office of the solicitor of the party ordered to produce, see *Groves* v. *Groves*, 2 W. R. 86 ; Daniell, 1677. In such case the solicitor may not charge the party inspecting for attendances, *Flockton* v. *Peake*, 12 W. R. 1023.

If the defendant is required to produce or obtain information as to deeds, &c., not in his possession, he is entitled to have the costs of so doing first tendered to him, *Bethell* v. *Casson*, 1 H. & M. 806 ; see note to r. 11, *ante*.

Expense of producing or getting information.

A plaintiff who obtains the common order for production, may inspec documents which are ordinarily produced only on payment of customary fees (*e.g.*, court rolls), without payment of such fees, *Hoare* v *Wilson*, L. R. 4 Eq. 1.

Production to agents

The common undertaking to produce "to the plaintiff," means "to the plaintiff, his solicitors, and agents," unless that be guarded against by the terms of the undertaking, *Williams* v. *Prince of Wales Assurance Company*, 23 Beav. 338 ; but it does not authorise inspection by a non-professional relation of the plaintiff, though alleged to be the only person acquainted with the accounts to be inspected, *Summerfield* v. *Pritchard*, 17 Beav. 9. The plaintiff's agent, for purposes of inspection, ought, it seems, to be a *legal* agent, or at least a general agent, and not one appointed for the special purpose, *Draper* v. *Manchester, &c., Railway Company*, 3 D. F. J. 23.

or accountants.

But on a special application, and on a special case being made out for it, an accountant may be allowed to inspect documents, *Bonnardet* v. *Taylor*, 1 J. & H. 383 ; but not an accountant who has any personal interest in the case, *Draper* v. *Manchester, &c., Railway*, 3 D. F. J. 23 ; see, however,

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Other scientific persons.

Lindsay v. *Gladstone*, L. R. 3 Eq. 132; *A.-G.* v. *Whitwood Local Board*, 19 W. R. 1107. Thus in *Re Joint Stock Discount Company*, 15 W. R. 99, an accountant was allowed to inspect the books of a company in course of being wound up on behalf of the shareholders on certain conditions; and where the issue in a cause depended in a great measure upon the state of the originals of certain engineering plans and documents, and the defendant deposed that he was not possessed of any engineering knowledge, and that the inspection of the documents would be useless to him without the aid and assistance of an engineer, the order for production and inspection was directed to extend to the defendant's surveyor, *Swansea Vale Railway Company* v. *Budd*, L. R. 2 Eq. 274. And where a creditor supported his claim in chambers by the production of certain documents which the plaintiff believed to be forged, liberty was given to have them examined by scientific persons to test their genuineness, the creditor's solicitor being allowed to be present at such examination (*Groves* v. *Groves*, Kay, App. xix., marginal note; see *Boyd* v. *Petrie*, L. R. 3 Ch. 818).

Not to co-defendants.

The common order for production does not authorise inspection by a co-defendant, *Bartley* v. *Bartley*, 1 Dr. 233; but it is immaterial that the party inspecting is a witness in the cause, if the question is merely as to the contents of the documents, *Swansea Vale Railway Company* v. *Budd* (*ubi sup.*); *secus*, where the question was whether the documents were forged, *Groves* v. *Groves*, 2 W. R. 86.

No lien for costs on deeds produced.

No lien for costs attaches, even in favour of the next friend of an infant plaintiff, who has repudiated the suit, upon any deed brought in merely to enable the plaintiff to obtain inspection for the purposes of discovery (*Dunn* v. *Dunn*, 3 Drew. 17; 7 D. M. G. 635). As soon, therefore, as the purposes of discovery are answered, they will be ordered to be re-delivered to the producing party (*ibid.*).

Sealing up irrelevant parts.

The order for production will give leave to seal up immaterial parts, *Mansel* v. *Feeney* (2), 2 J. & H. 320; *Heugh* v. *Garrett*, 32 L. T. N. S. 45; and where defendants ordered to produce had omitted to state their desire to seal up part of a book in their original affidavit, they were allowed to make a special application for leave to do so by summons without paying the costs thereof, *Talbot* v. *Marshfield*, L. R. 1 Eq. 6.

A party under such order is justified in making copies, &c., of all parts of the document produced not sealed up under the terms of the order (*Coleman* v. *West Hartlepool Harbour Company*, 5 L. T. N. S. 266).

As to where the parts of a document for which privilege is claimed are so interspersed with the rest of the document that sealing up would be impossible, see *Churton* v. *Frewin*, 2 Dr. & S. 394; *Kettlewell* v. *Barstow*, L. R. 7 Ch. 687.

Form of notice.

15. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the form No. 10 in Appendix (B) hereto * (*a*).

* Appendix of forms, *post*.

Party pleading documents to give notice when documents are to be inspected.

16. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in rule 13, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents or such of

them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the form No. 11 in Appendix (B) hereto,* with such variations as circumstances may require.

* Appendix of forms, *post.*

Order in default.

17. If the party served with notice under rule 15 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a judge for an order for inspection.

Application for order for inspection of documents which have not been pleaded.

18. Every application for an order for inspection of documents shall be to a judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

Where right to discovery or inspection depends on determination of issue in cause.

19. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action (*a*), or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Right to discovery depending on decision of action.

(*a*) Thus, where the issue raised was whether the defendant had agreed to pay the plaintiff a sixth of his profits, the plaintiff was not entitled to the production of the books and accounts of the defendant before the hearing, *Turney* v. *Bayley*, 12 W. R. 633 ; see *Mansel* v. *Feeney*, 2 J. & H. 323 ; so where in a patent suit an interrogatory *assumed* infringement, *De la Rue* v. *Dickinson*, 3 K. & J. 388 ; *Crossley* v. *Stewart*, 1 N. R. 426 ; *Forbes* v. *Tanner*, *ibid.* 464 ; *Kay* v. *Hargreaves*, 14 L. T. N. S. 281 ; *Finnegan* v. *James*, L. R. 19 Eq. 72 ; *Hoffman* v. *Postill*, L. R. 4 Ch. 673 ; see as to the discretion of the Court in these cases, where the plaintiff asks for discovery to which he is not entitled if he is wrong, and which, if he wins, will be his as a matter of course, *Elmer* v. *Creasy*, L. R. 9 Ch. 69 ; *Lett* v. *Parry*, 1 H. & M. 517 ; *Lockett* v. *Lockett*, L. R. 4 Ch. 336 ; *Saull* v. *Browne*, L. R. 17 Eq. 402, 9 Ch. 364 ; *G. W. Colliery Compy.* v. *Tucker*, L. R. 9 Ch.

Order XXXI. 376; *Thomson* v. *Dunn*, L. R. 5 Ch. 573; *Carver* v. *Pinto Leite*, L. R. 5 Ch. 90; *Heugh* v. *Garrett*, 32 L. T. N. S. 45.

Where the materiality of the discovery depends upon the determination of the question in dispute, and the discovery sought is likely to cause considerable trouble and to prove offensive to the person from whom it is sought, the Court will, under this rule, postpone the discovery until the question has been determined, *Wood* v. *Anglo-Italian Bank*, 34 L. T. N. S. 255, C. P. D.

Penalty for not giving discovery or producing documents when ordered.

20. If any party (*b*) fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment (*c*). He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution (*d*), and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly.

Wife making discovery.

(*b*) Where a husband and wife were ordered to make discovery and the husband absconded and the wife alone made the discovery, it was held a substantial compliance with the order, *Hartley* v. *Owen*, W. N. (1876) 193, 34 L. T. N. S. 752.

Attachment for not accounting, &c.

(*c*) This rule takes the place of Cons. Ord. XII., by which a defendant might be attached for not answering. This rule does not authorise attachment for not giving names of partners under Ord. XVI. r. 10, or for not giving in accounts under Ord. XV. r. 1, *Pike* v. *Keene*, 24 W. R. 322. See generally as to attachment Ord. XLIV., *post.*

(*d*) It is not *imperative* on the Court to dismiss the action under the rule, *Hartley* v. *Owen*, *ubi sup.*, but it will generally be dismissed for default on the part of the plaintiff, *Republic of Liberia* v. *Roye*, L. R. 9 Ch. 569, 1 App. Cas. 139.

Service of order for discovery on solicitor.

21. Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

Attachment of solicitor.

22. A solicitor upon whom an order against any party for discovery or inspection is served under the last rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

Using answers as evidence.

23. Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Provided always, that in such case the judge may look at

the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in (*e*). Order XXXI.

(*e*) See as to reading the answers under the old practice of a defendant as evidence, *Feilden* v. *Slater*, L. R. 7 Eq. 523; *Stephens* v. *Heathcote*, 1 Dr. & Sm. 138; *Dawkins* v. *Morton*, 1 J. & H. 339; *Rehder* v. *Wesley*, 26 Beav. 432; *Truck* v. *Lamprell*, 3 W. R. 193; *Ashmall* v. *Wood*, 3 Jur. N. S. 232; and as to entering the answers as read in the decree, *Bright* v. *Legerton* (No. 2), 29 Beav. 69.

ORDER XXXII. Order XXXII.

Admissions.

1. Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party (*a*). Admissions by notice in statement.

(*a*) As to admission of allegations not denied, see Ord. XIX. r. 17, and as to costs occasioned by refusal to admit, see Ord. XXII. r. 4, p. 497, *ante*.

When husband and wife answered jointly instead of the wife answering separately, it was held that her admissions might nevertheless be read against her with reference to her separate estate, *Clive* v. *Carew*, 1 J. & H. 207; *Callow* v. *Howle*, 1 De G. & Sm. 531.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense (*b*). Notice to admit documents.

(*b*) This rule is from s. 7 of Lord Cairns' Act, see p. 246, *ante*.

3. A notice to admit documents may be in the form No. 12 in Appendix (B) hereto.* Form of notice.

4. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any Signatures to admission.

* Appendix of forms, *post*.

Order XXXII.

notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions.

Order XXXIII.

ORDER XXXIII.

Inquiries and Accounts.

The Court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts (*a*) to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

Accounts under Ord. XV.

Further consideration not necessary.

Prosecution of inquiries and accounts in chambers.

Cons. Ord. XX.

(*a*) As to taking an order for accounts on a writ indorsed for that purpose, see Ord. XV., *ante*. Under this order no further consideration may be necessary, *e.g.*, in a case where plaintiff and defendant admit that there are accounts to be taken, the taking of the accounts may be ordered in interlocutory application, and a final decree will follow with no need for further consideration. See *Turquand* v. *Wilson*, V.-C. H., L. R. 1 Ch. Div. 85, cited in note to Ord. XL. r. 11.

As to the prosecution of inquiries and accounts in chambers, see Cons. Ord. XXXV. r. 22, *et seq.*, p. 145, *ante*, which provide a time for bringing in the decree (r. 22), and for prompt prosecution of the proceedings (r. 23), and see further references in note (*b*) to Ord. XV. r. 1, *ante*.

Compare Cons. Ord. XX. as to accounts and inquiries necessary to be taken before the rights of parties can be ascertained, which provides as follows :—

Order directing accounts and inquiries.

Where it appears that certain preliminary accounts and inquiries must be taken and made before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time after the defendants shall have appeared to the bill, to move the Court on notice, that such inquiries and accounts shall be taken and made; and an order directing such inquiries and accounts shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the Court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants as being competent to consent have not put in

their answer to the bill, and that the same is consented to by, or is proper to be made upon the statements contained in the answers of such (if any) of the defendants as have answered the bill.

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Under this order where preliminary inquiries were directed, but in consequence of some irregularity the bill was afterwards dismissed against one defendant, the preliminary inquiries were, under special circumstances, prosecuted against the other defendants, the plaintiff waiving all relief against the party dismissed (*Chaffers* v. *Baker*, 5 W. R. 515).

Preliminary inquiries prosecuted against some defendants only.

The Court would not act under this rule where some of the defendants were out of the jurisdiction (*Derbishire* v. *Home*, 14 Jur. 969 ; see *Barrett* v. *Buck*, 2 Hare, 520) ; or where some of the defendants objected that persons not parties were interested (*Ibid.* ; and see *Logan* v. *Baines*, 10 Sim. 604) ; for the inquiry must be binding on all parties (*Meinertzhagen* v. *Davis*, 10 Sim. 289 ; but see now Ord. XVI. r. 9, *ante*). Nor was the rule acted upon where the plaintiff's title (*Wilson* v. *Applegarth*, 10 Sim. 657 ; *Kinshela* v. *Lee*, 7 Beav. 300), or the substantial equity of the case (*Belcher* v. *Whitemore*, 7 Beav. 245) was denied by the defendant. See, too, *Wallis* v. *Sarel*, 8 Jur. 640 ; and *Reed* v. *Don Pedro Mining Company*, 11 W. R. 935, where the Lords Justices refused to direct a reference as to title, one of the defences set up by the answer being that the title was not made out in time.

Court refuses to act on this rule, *unless all parties will be bound* by the inquiries.

In *Foxlowe* v. *Amcoats*, 4 Jur. 1053, a suit for specific performance, the Court on motion under this rule referred it to the Master to inquire whether the plaintiff had shown a good title, and when first, without prejudice to the question of specific performance. And in general the inquiries were such as would have been directed at the hearing (*Meinertzhagen* v. *Davis*, 10 Sim. 289) ; and they were regulated by the nature of the suit (*Collinson* v. *Ballard*, 2 Hare, 119) ; and they were not such as would involve the decision of the questions at issue in the cause (*Curd* v. *Curd*, 2 Hare, 116 ; *Breeze* v. *English*, *id.* 118 ; *Lee* v. *Shaw*, 10 Sim. 369 ; *Frost* v. *Hamilton*, 4 Beav. 33).

What inquiries will be directed under this order.

As to the evidence which would justify the Court in directing these inquiries generally, see *Miller* v. *Priddon*, 1 M. & G. 687 ; *Skarf* v. *Soulby*, 1 M. & G. 364 ; *Jenkyn* v. *Vaughan*, 4 W. R. 214.

Evidence.

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Order XXXIV.

Questions of Law.

1. The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court (*a*). Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents (*b*) as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such

Parties in action may state questions of law in a special case.

Reference to documents.

Order XXXIV.

documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

Original special case under Sir G. Turner's Act compared.

(*a*) The practice under Sir G. Turner's Act, p. 118, *ante*, of filing original special cases, would seem to be affected, but not made obsolete by these rules.

Where a special case is stated after a writ has been issued under this rule the previous orders as to parties, &c., apply, *e.g.*, Ord. XVI. r. 7, as to executors and trustees, and *ibid.*, r. 8, as to married women and infants, and Ord. XVIII., as to lunatics.

13 & 14 Vict. c. 35,

But if an original special case is stated under Sir George Turner's Act, s. 1, *ante*, p. 118, recourse must be had to the special enactments of that Act as to lunatics, married women, infants, &c.

S. 2, lunatics;

* See now Ord. XVIII. and note.

Thus, by s. 2 of that Act "the committee of the estate of any lunatic "interested or claiming to be interested in any such question as aforesaid "may, after having been authorised in that behalf by the Lord Chancellor * "concur in such case in his own name and in the name and on the behalf of "the lunatic," and by s. 3, "a husband interested or claiming to be interested "in the right of his wife in any such question as aforesaid may concur in "such case in his own name and in the name of his wife where the wife has "no claim to any interest distinct from her husband, and a married woman "having or claiming any interest in any such question as aforesaid distinct "from her husband may in her own right concur in such case, provided that "her husband also concurs therein;" and by sect. 4, "the guardian † of any "infant interested or claiming to be interested in any such question as afore-"said may concur in such case in the name and on the behalf of the infant, "unless such guardian has an adverse interest."

S. 3, married women;

S. 4, infant;

† See interpretation clause, p. 120, *ante*.

Ss. 5, 6, special guardian.

And by s. 5 "the Court may by order to be made in the matter of any "lunatic not so found, or in the matter of any infant (and in the matter of the "Act, *Star* v. *Newbery*, 20 Beav. 14) upon the application of any person, on "behalf of the lunatic or upon the application of the infant, by motion or "petition, appoint any person shown by affidavit to be a fit person, and to "have no interest adverse to the interest of the lunatic or infant, to be "the special guardian of such lunatic or infant for the purpose of concur-"ring in such case, in the name and on behalf of the lunatic or infant, and "any such person so appointed may lawfully so concur: Provided always, "that it shall be lawful for the said Court to require notice of such applica-"tion to be given to such person, if any, as the Court shall think fit."

And by s. 6 "in any case in which any such order as aforesaid shall have "been made by the said Court in the matter of any infant without notice to "the guardian of the infant, the Court, if it shall think fit, may discharge "such order, upon the application of such guardian by motion or petition; "and may appoint some other fit person to be the special guardian of such "infant for the purpose of such special case, and may also give such direc-"tions as may be necessary for substituting in such special case either the "name of the guardian so applying, or of the special guardian so appointed "in lieu of the name of the special guardian so displaced: Provided always, "that the discharge of any order appointing a special guardian shall not "invalidate anything which shall in the meantime have been done by such "special guardian, unless the Court shall, upon notice to all parties, specially "so direct."

Parties to original special case.

It has been held that persons might represent classes for the purpose of special cases under the Act; see Order XVI. rr. 7, 9, 11, *ante*; *Bayley* v. *Miles*, 30 L. T. N. S. 784; *Bardwell* v. *Sheffield Waterworks Company*, L. R. 14 Eq. 517; *Re Brown*, 29 Beav. 401; *Swallow* v. *Binns*, 9 Hare, App. xlvii; *Bayley* v. *Miles*, W. N. (1870) 42. Where a special case under the Act seeks to have the construction of the trust deed determined the trustees ought to be parties, *Vorley* v. *Richardson*, 8 D. M. G. 126, overruling *Darby* v. *Darby*, 18 Beav. 412.

Sir G. Turner's Act.

Ss. 7, 9. Form of original special case; amendment.

Sect. 7 of Sir G. Turner's Act provided as to the form of an original special case (which may be amended, *Thistlethwaite* v. *Garnier*, 5 De G. & Sm. 73; *Domville* v. *Lamb*, 9 Hare, App. lv.; *Palmer* v. *Floyer*, 18 W. R. 887; *Bell* v. *Cade*, 2 J. & H. 122) as follows:—

"Every such special case is to be entitled as a cause between some or one "of the parties interested or claiming to be interested as plaintiffs or plaintiff, "and the others or other of them as defendants or defendant, and that in the "title to such cases lunatics and infants shall be described as such, and their "committees, guardians, or special guardians named; and that where in any "such case a married woman is named as a plaintiff and her husband as a "defendant thereto, a next friend of such married woman shall be named in "the title to such case."

Sect. 8 is substantially the same as rule 1 in the text, and by s. 9 "every "such special case to which an infant or lunatic is a party by his guardian or "special guardian shall also state how such guardian or special guardian was "constituted; and where any married woman having or claiming any "interest distinct from her husband is a party to such case, it shall be "stated therein that she concurs in such case in her own right."

S. 10. Signature by counsel, &c.

By s. 10, original special cases are to be signed by counsel (but this is no longer necessary, *Hare* v. *Hare*, W. N. (1876) 44), and appearances are to be entered by defendants.

S. 11–13. Setting down for hearing.

Sects. 11—13 related to setting down for hearing, as to which see now r. 5, *infra*, and the parties are to be bound by the statements in the case after the defendants have appeared, except married women, infants, and lunatics, who are not to be bound till leave is given by the Court to set the case down; see rule 4, *infra*.

Registrar's regulations, 15 March, 1860.

The Registrar's Regulations, 15th March, 1860, provide (r. 8) that "if all "parties are not *sui juris*, special cases are to be set down upon production "of an order for leave to set down the same; or if all parties are *sui juris*, "upon production of the Record and Writ Clerk's certificate, indorsed by "the solicitor with a memorandum to that effect, in the form following:—

"'All parties are *sui juris*.'

"A, B., Plaintiff's Solicitor.

"1st March, 1860."

Upon hearing, Court to determine question and make declaration.

Proviso that a case may be sent to common law court.

Proviso that Court may refuse to decide.

By section 14 of Sir G. Turner's Act, "it shall be lawful for the "Court, upon the hearing of any such special case as aforesaid, "to determine the questions raised therein, or any of them, and by "decree to declare its opinion thereon, and, so far as the case shall admit "of the same, upon the right involved therein, without proceeding to "administer any relief consequent upon such declaration; and that every "such declaration of the said Court contained in any such decree shall have "the same force and affect as such declaration would have had, and shall "be binding to the same extent as such declaration would have been, if con-"tained in a decree made in a suit between the same parties instituted by "bill: Provided always, that it shall be lawful for the said Court, if it "shall see fit so to do, before proceeding to make such decree as aforesaid, "to send any case or cases for the opinion of any of Her Majesty's Courts "of Common Law, reserving the consideration of all further directions and "of the costs, and to make such decree as aforesaid upon such further "directions: Provided also, that if upon the hearing of such special case "as aforesaid the Court shall be of opinion that the questions raised "thereby or any of them cannot properly be decided upon such case, the "said Court may refuse to decide the same."

Declarations as to future rights.

Under this section it was held that the Court had no jurisdiction upon a special case under the Act to make binding declarations of future rights (*Burt* v. *Sturt*, 1 W. R. 145; *Greenwood* v. *Sutherland*, 10 Hare, App. xii.; *Garlick* v. *Lawson*, *ibid.*, xiv.; *Gosling* v. *Gosling*, Jo. 265. But see *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. J. 613). In *Bell* v. *Cade*, 2 J. & H. 122, it was held that the Court might declare whether a person claiming a future right in remainder took such an interest in the property in

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question as to entitle him to file a bill to have it secured for his benefit, and compare *Webb* v. *Byng*, 8 D. M. G. 633 ; *Savage* v. *Tyers*, L. R. 7 Ch. 376 ; *Key* v. *Key*, 4 D. M. G. 73 ; *Fosbrook* v. *Fosbrook*, L. R. 3 Ch. 93 ; *Pryse* v. *Pryse*, L. R. 15 Eq. 86.

S. 15. Trustees, &c., protected.

By sect. 15 "every executor, administrator, trustee, or other persons "making any payment or doing any act in conformity with the declaration "contained in any decree made upon a special case is in all respects to be "as fully and effectually protected and indemnified by such declaration as if "such payment had been made or act done under or in pursuance of the ex- "press order of the Court made in a suit between the parties, save only as "to any rights or claims of any person in respect of matters not determined "by such declaration."

S. 16. Rehearings and appeals.

By sect. 16 "where any person shall be desirous to have a special case "reheard, or to appeal from the decision thereon, the Court may, upon appli- "cation for that purpose, either at the time of the decree upon such special "case being made or at any time afterwards, and upon such conditions, if "any, as the Court shall think fit, order that the declaration contained in "such decree shall not be acted upon for such time as the said Court shall "think just."

S. 17. Original special case a *lis pendens*.

By sect. 17 "the filing of a special case, and the entering of appearances "thereto by the persons named as defendants therein, shall be taken to be a "*lis pendens*, and may be registered under 2 & 3 Vict. c. 11, and, until so "registered, shall not bind a purchaser or mortgagee without express notice "thereof."

S. 18. Production of documents.

And by sect. 18 "any documents referred to in a special case, and any "copies thereof, or extracts therefrom, identified by the signature of the soli- "citors for all parties, or of the London agents of such solicitors, may be "produced and read at the hearing of such case, without further proof ; the "Court may at any time after the filing of the special case, and the entering "of appearances thereto by the persons named as defendants therein, order "any document which may be admitted thereby to be in the possession of any "party to such case to be deposited and produced in such manner and for such "purposes as the Court shall think fit."

Costs of original special case.

See *Jackson* v. *Craig*, 15 Jur. 811, as to the costs of special cases ; in *Blinston* v. *Warburton*, 2 K. & J. 406, it was said by V.-C. Wood, that there should either be some arrangement between the parties or a question in the case out of what fund they should be paid. The latter course has been generally adopted in practice ; but see *Usticke* v. *Peters*, 4 K. & J. 437.

As a general rule, the Court, in awarding the costs of a special case under the Act has been governed by the rules which regulate it in ordering payment of the costs of a suit instituted by bill. Thus, if the difficulty arise out of a testator's will, the costs, as in an administration action, were ordered to be borne by the testator's general estate (*Cookson* v. *Bingham*, 17 Beav. 262 ; *Hindle* v. *Taylor*, 5 D. M. G. 585 ; but see *Lloyd* v. *Cocker*, 27 Beav. 649); or residuary real estate (*Marshall* v. *Grime*, 28 Beav. 379) ; or, if there be no general estate, by the fund specifically bequeathed, *Cookson* v. *Bingham*, *ubi sup.*; but see also, *Lloyd* v. *Cocker*, *ubi sup.*; and *Usticke* v. *Peters*, 4 K. & J. 437, where V.-C. Wood held that the costs of a special case were not to be decided on the same principle as those of an administration suit, and that a plaintiff succeeding upon a special case arising out of the construction of a will was entitled to his costs from the defendant. So in *Mortimore* v. *Mortimore*, 4 De G. & J. 472, a special case having been stated for the opinion of the Court, at the instance of a tenant for life, with a view to obtaining an increase of her income by an investment, of which the Court in its judgment expressed disapprobation, the income of the tenant for life was ordered to bear the costs. Again, in *Sabin* v. *Heape*, 27 Beav. 561, where the question was whether the plaintiffs could make a good title, the costs of a special case were, in answer to a question in the case, declared to be payable by the defendant, upon the principle that, if a bill had been filed for specific performance, a decree would have been made against him with costs.

Statement of facts.

(*b*) See as to the statement of the facts, *Domville* v. *Lamb*, 9 Hare, App.

iv. ; *Bulkeley* v. *Hope*, 8 D. M. G. 36 ; and as to prefacing the order where they are omitted, *Lane* v. *Debenham*, 17 Jur. 1005.

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Judge may direct question of law arising in suit to be raised by special case or otherwise.

2. If it appear to the Court or a judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient (*c*); and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

(*c*) Questions of law will not be tried speculatively, *i.e.*, they must be necessary for the decision of the action (*Republic of Bolivia* v. *National Bolivian Navigation Company*, 24 W. R. 361).

Print of special case.

3. Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and shall be filed by the plaintiff (*d*). Printed copies for the use of the judges shall be delivered by the plaintiff.

(*d*) Signature of counsel is no longer necessary (*Hare* v. *Hare*, W. N. (1876) 44).

Setting down where married women, infants, and persons of unsound mind are parties.

4. No special case in an action to which a married woman (*e*), infant, or person of unsound mind is a party shall be set down for argument without leave of the Court or a judge (*f*), the application for which must be supported by sufficient evidence (*g*), that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

Application for leave to set down.

(*e*) This rule is in substance identical with s. 13 of Sir G. Turner's Act (see note (*a*) *supra*), under which it was held that the application must be made in Court, *Sidebotham* v. *Watson*, 1 W. R. 229.

Birth of party interested or marriage after case set down.

(*f*) For the practice when a woman, who is a party, marries after the case is set down, see *Johnson* v. *Brown*, L. R. 8 Eq. 584 ; *Atty* v. *Etough*, L. R. 13 Eq. 462.

Where an infant interested in the case was born after the setting down, a decree was made, prefaced by an order to amend and set down against the infant, *Barnaby* v. *Tassell*, L. R. 11 Eq. 363. See *Savage* v. *Snell*, L. R. 11 Eq. 264 ; *Cadman* v. *Cadman*, W. N. (1871) 75.

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(y) Counsel's statement was held sufficient evidence in *Elwes* v. *Elwes*, 20 W. R. 480.

Entry for argument.

5. Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the form No. 13 in Appendix (B) hereto,* and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument.

* Appendix of forms, *post.*

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ORDER XXXV.

Proceedings in District Registries.

Proceedings in district registry.

1 (*a*). Where an action proceeds in the district registry, all proceedings, except where by any of the rules of the Supreme Court it is otherwise provided, or the Court or a judge shall otherwise order, shall be taken in (*b*) the district registry, down to and including final judgment; and every final judgment, and every order for an account by reason of the default of the defendant† or by consent, shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in London.

† Ord. XXIX. r. 10.

Where the writ of summons is issued out of a district registry and the plaintiff is entitled to enter interlocutory judgment under Order XIII. rule 6,‡ or where the action proceeds in the district registry and the plaintiff is entitled to enter interlocutory judgment under Order XXIX. rule 4 or 5,§ in either case such interlocutory judgment, and when damages shall have been assessed, final judgment, shall be entered in the district registry, unless the Court or judge shall otherwise order.

‡ Writ specially indorsed.

§ Action for detention of goods.

Where an action proceeds in the district registry, final judgment shall be entered in such registry, unless the judge at the trial, or the Court, or a judge shall otherwise order.

Actions in the Queen's Bench, Common Pleas, and Ex-

chequer Divisions shall be entered for trial with the associates, and not in the district registries. Order XXXV.

(*a*) This rule was substituted for the original rule by Rule 12 of June, 1876.

(*b*) An application for a decree, with liberty to adopt the proceedings in the district registry, was refused, but the usual administration decree was made, with a direction that the accounts and inquiries should be taken and made in the district registry, and that the sale of the real estate should take place in *London* under the supervision of the judge in chambers (*Irlam* v. *Irlam*, L. R. 2 Ch. Div. 608, but this was before the rule in the text was substituted for the original rule, under which the proceedings in the district registries were to stop at the entry for trial. Accounts, &c., in district registry.

See also *Birmingham Waste Company* v. *Lane*, 24 W. R. 292; *Walker* v. *Robinson*, *ibid.*, 427, 34 L. T. N. S. 229, as to taking accounts in the district registry. The Court will not appoint a receiver in a district registry cause, *Walker* v. *Robinson*, 34 L. T. N. S. 229. The Court refused to allow the costs of an action in the district registry to be taxed there, *Irlam* v. *Irlam*, 24 W. R. 949. Receiver. Taxation.

2. Subject to the foregoing rules, where an action proceeds in the district registry the judgment and all such orders therein as require to be entered, except orders made by the district registrar under the authority and jurisdiction vested in him under these rules, shall be entered in London, and an office copy of every judgment and order so entered shall be transmitted to the district registry to be filed with the proceedings in the action. Entry of judgment in London.

3. Where an action proceeds in the district registry all writs of execution for enforcing any judgment or order therein shall issue from the district registry, unless the Court or a judge shall otherwise direct. Where final judgment is entered in the district registry costs shall be taxed in such registry unless the Court or a judge shall otherwise order. Issue of process and taxation of costs in district registry.

4. Where an action proceeds in a district registry the district registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a judge at chambers (*c*), except such as by these rules a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions is precluded from exercising. Authority and jurisdiction of district registrar.

(*c*) See *Meek* v. *Michaelson*, W. N. (1876) 111, where it was intimated that a district registrar could make an order for notice in lieu of service.

5. Every application to a district registrar shall be made in the same manner in which applications at chambers are directed to be made by these rules. Applications how made.

Order XXXV.

Reference by registrar to judge.

6. If any matter appears to the district registrar proper for the decision of a judge, the registrar may refer the same to a judge (*d*), and the judge may either dispose of the matter or refer the same back to the registrar with such directions as he may think fit.

(*d*) The registrar cannot act under this rule unless a summons has been taken out, calling on the other side to appear before the registrar, W. N. (1875) 250.

Appeal to judge.

7. Any person affected by any order or decision of a district registrar may appeal to a judge. Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the district registrar had jurisdiction only by consent. Such appeal shall be by summons within four days after the decision complained of, or such further time as may be allowed by a judge or the registrar.

Stay of proceedings on appeal.

8. An appeal from a district registrar shall be no stay of proceedings unless so ordered by a judge or the registrar.

District registrars subject to judge's control.

9. Every district registrar and other officer of a district registry shall be subject to the orders and directions of the Court or a judge as fully as any other officer of the Court, and every proceeding in a district registry shall be subject to the control of the Court or a judge, as fully as a like proceeding in London.

Judge to whom action is assigned (Ord. V. r. 4.)

10. Every reference to a judge by or appeal to a judge from a district registrar in any action in the Chancery Division shall be to the judge to whom the action is assigned.

When defendants may remove the actions from the district registry.

11. In any action which would, under the foregoing rules, proceed in the district registry, any defendant may remove the action from the district registry as of right in the cases, and within the times, following:

Where the writ is specially endorsed under Order III. rule 6, and the plaintiff does not within four days after the appearance of such defendant give notice of an application for an order against him under Order XIV., then such defendant may remove the action as of right at any time after the expiration of such

four days, and before delivering a defence, and before the expiration of the time for doing so;

Where the writ is specially indorsed and the plaintiff has made such application as in the last paragraph mentioned, and the defendant has obtained leave to defend in manner provided by Order XIV., then such defendant may remove the action as of right at any time after the order giving him leave to defend, and before delivering a defence and before the expiration of the time for doing so;

Where the writ is not specially indorsed any defendant may remove the action as of right at any time after appearance, and before delivering a defence, and before the expiration of the time for doing so.

[Rule 11A, added by Rule 10 of Dec., 1875, relates to Admiralty actions only.]

Notice of removal of actions to London.

12. Any defendant desirous to remove an action as of right under the last preceding rule may do so by serving upon the other parties to the action, and delivering to the district registrar, a notice, signed by himself or his solicitor, to the effect that he desires the action to be removed to London, and the action shall be removed accordingly: Provided, that if the Court or a judge shall be satisfied that the defendant giving such notice is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or judge may order that the action may proceed in the district registry notwithstanding such notice.

Removal on application of any party.

13. In any case not provided for by the last two preceding rules, any party to an action proceeding in a district registry may apply to the Court or a judge, or to the district registrar, for an order to remove the action from the district registry to London, and such Court, judge, or registrar, may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just (*e*).

Any party to an action proceeding in London may apply to the Court or a judge for an order to remove the action

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from London to any district registry, and such Court or judge may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall seem just.

(*e*) See cases cited in note (*b*), *supra*.
Where a plaintiff commenced an action in a district registry for administration of an estate, and delivered his statement of claim marked for V.-C. Bacon's Court, that judge, on the defendant's making default, and the plaintiff thereupon becoming entitled to set down the action on motion for judgment, ordered the cause to be transferred to himself under this rule, *Walker* v. *Robinson*, 34 L. T. N. S. 229, 24 W. R. 437.

Registrar to transmit documents,

14. Whenever any proceedings are removed from the district registry to London, the district registrar shall transmit to the proper officer of the High Court of Justice all original documents (if any) filed in the district registry, and a copy of all entries in the books of the district registry of the proceedings in the action.

and account for monies.

15. Every district registrar shall account for and pay over to the Treasury, all monies paid into Court at the registry of which he is registrar, in such manner and at such time as may be from time to time directed by the Treasury (*f*).

(*f*) This rule was added by r. 11 of December, 1875.

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ORDER XXXVI.

Trial.

Places for trial.

1. There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried (*a*), and the action shall, unless a judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless a judge otherwise orders, be the county of Middlesex. Any order of a judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.

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Trial before judge with or without assessors or jury, or before referees.

2. Actions shall be tried and heard either before a judge or judges (*b*), or before a judge sitting with assessors, or before a judge and jury (*c*), or before an official or special referee, with or without assessors.

(*a*) This clause applies to Chancery actions, *Redmayne* v. *Vaughan*, 24 W. R. 983.

Hearings in private.

(*b*) As to hearings in private, see *Andrew* v. *Raeburn*, L. R. 9 Ch. 522; *Ogle* v. *Brandling*, 2 R. & M. 688.

Jury trial in Chancery Division.

(*c*) The judges of the Chancery Division have decided that under the rules and the Act they have no jurisdiction to try jury cases, but that actions in the Chancery Division for trial by jury are to be set down for trial in Middlesex, unless another place or county be named in the statement of claim under r. 1, *supra*. See remarks of Hall, V.-C., in *Clarke* v. *Cookson*, L. R. 2 Ch. Div. 746, 24 W. R. 535; but see Cons. Ord. XLI. rr. 26—52 (p. 244, *ante*), relating to the trial of causes by a judge with a jury in Chancery, and compare note (*e*) *infra*.

Plaintiff's and defendant's option as to mode of trial.

3. Subject to the provisions of the following rules * the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in rule 2; and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or judge may allow, to the effect that he desires to have the issues of fact (*d*) tried before a judge and jury, be entitled to have the same so tried (*e*).

* See r. 26, giving the judge a discretion.

Issues of fact.

(*d*) Issues of fact must be precise, and not such as to lead to unlimited inquiries, see *Other* v. *Smurthwaite*, L. R. 5 Eq. 437.

See Ord. XXVI. as to settlement of issues by the judge, and p. 246, *ante*, as to hearing counsel on questions of fact.

Defendant may decline trial by assessors, and ask for trial by jury.

(*e*) Though a plaintiff gives notice of trial before judge and assessors the defendant cannot be deprived of his option to give notice under this rule, requiring a trial of issues of fact by jury, *Sugg* v. *Silber*, L. R. 1 Q. B. Div. 362, 24 W. R. 640, where it was held that where the plaintiff gives notice of trial before a judge sitting with assessors, the defendant has a right under this rule by giving notice within the time specified, to insist on a trial before a judge and jury; and that the Judicature Acts and rules of Court do not give power to the Court or a judge to deprive the defendant of this right, but the judge may use his discretion under r. 26 to hear the cause first without a jury in order to see whether it cannot be decided without trying the issues at all, *Swindell* v. *Birmingham Syndicate*, W. N. (1876) 188, 217; 24 W. R. 911.

Trial of issues will not be allowed unless it is clear they will be needed for the decision of the action, *Republic of Bolivia* v. *Bolivian Coy.*, 24 W. R. 361.

Cons. Ord. XXI.

Cons. Ord. XXI., relating to setting down and hearing seems to be still applicable to Chancery causes, as follows:

[Rule 1, as to serving subpœna to hear judgment, is superseded by the simpler practice of giving notice.]

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2. *All causes required to be heard shall be set down for hearing by the registrars, upon production to them of the certificate of the proper officer that the same are in a fit state to be set down for hearing.*

Cons. Ord. XXI. Rule 2. Causes to be set down on certificate of proper officer.

By the Registrar's Regulations, March, 1860, rr. 1, 7, it is provided as follows:

Registrar's Regulations, March, 1860.

1. Demurrers, original causes, special cases, causes for further consideration, and appeals and rehearings, are to be set down by the registrar's clerk at the order of course seat on the same day the order, petition, Record and Writ Clerk's certificate, request or other document required for that purpose, is produced to or left with him; and he is to retain any such petition, certificate, or request for filing.

Original causes. Cons. Ord. 6, rr. 2, 3.

7. Causes are to be set down for original hearing upon production of the Record and Writ Clerk's certificate that the cause is in a fit state to be set down for hearing, indorsed by the solicitor of the party setting down the same with a memorandum stating, if there be any infant defendant, that a guardian *ad litem* has been appointed; or if there be not, stating that there is not, any infant defendant. The memorandum may be in the form following, that is to say:

"A guardian *ad litem* has been appointed to the infant defendant A.B.,"

or,

"There is not any infant defendant."

A.B., plaintiff's solicitor.

1st March, 1860.

[Rules 3—5, related to sealing subpœna to hear judgment.]

Rule 6. Advancement of foreclosure clauses.

6. *Foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances and subject to the same rules as other causes may be ordered to be so advanced.*

Costs of application.

Notice of application.

The costs of a successful application under this rule were directed to be costs in the cause (*Carthew* v. *Barclay*, 10 Sim. 273; but see *Browne* v. *Lockhart*, 10 Sim. 420). The application should be on notice (*Powell* v. *Calloway*, 4 Jur. 859). The application will not be granted unless the defendant consents, *semble* (*Lewin* v. *Moline*, 1 Beav. 99; and see *Mountford* v. *Cooper*, 1 Keen, 464; and *Rashleigh* v. *Dayman*, 2 Madd. 147, there cited).

Rule 7. Abatement or compromise after setting down cause to be certified.

7. *Where any cause becomes abated or is compromised after the same is set down to be heard, the solicitor for the plaintiff shall certify the fact, as the case may be, to the registrar, who shall cause an entry thereof to be made in the cause-book opposite to the name of such cause.*

Costs of the day.

If this be not done, the defendant will be entitled to the costs of the day (*Saner* v. *Deavin*, 14 Beav. 646).

Rule 8. Causes abated or standing

8. *Where any cause shall have been standing for one year in the cause-book, marked as "abated," or standing*

over generally, such cause shall, at the expiration of the year, be struck out of the cause-book.

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over for one year.

But where infants who had nearly attained twenty-one were interested in the subject-matter of a suit set down for hearing, the Court by consent ordered the cause to be retained in the registrar's book till they attained twenty-one (*Brooke* v. *Todd*, 6 Jur. N. S. 664).

Rule 9. Causes on further directions and on equity reserved.

9. *All causes for further directions, or on equity reserved after a trial at law shall have been had in pursuance of a decree or order pronounced by the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, and all pleas, demurrers, and exceptions to Master's Reports required to be heard before the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, shall be set down by the registrars for hearing, on orders drawn up by them upon petition to the Lord Chancellor to be left with the registrar, or on orders drawn up by one of the secretaries at the Rolls upon petition of course to the Master of the Rolls, as the case may be.*

Pleas, demurrers, exceptions to reports, how set down.

Rule 10. Causes how set down; causes on further consideration.

10. *When any cause shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, such cause may, after the expiration of eight days and within fourteen days from the filing of the certificate of the chief clerk of the judge to whose court the cause is attached, be set down by the registrar in the cause-book for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the cause; and after the expiration of such fourteen days the cause may be set down by the registrar on the written request of the solicitor for the plaintiff or for any other party; and the request to set down the cause may be in the form or to the effect firstly set forth at the end of this rule; but the cause, when so set down, shall not be put into the paper for further consideration until after the expiration of ten days from the day on which the same was so set down, and shall be marked in the cause-book accordingly. And notice thereof shall be given to the other parties in the cause at least six days before the day for which the same may be so marked for further*

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consideration, and such notice may be in the form or to the effect secondly set forth at the end of this rule.

Registrar's Regulations, March 15, 1860.

The Registrar's Regulations, March 15, 1860, provide (r. 9) as follows as to setting down causes on further consideration:

Causes for further consideration (Cons. Ord. XXI. r. 10).

9. Causes for further consideration are to be set down, after the expiration of eight days and within fourteen days from the filing of the chief clerk's certificate, upon production of the written request of the plaintiff or party having the conduct of the cause; and after the expiration of the fourteen days, upon production of the written request of the solicitor for the plaintiff or any other party desiring to have the same set down; and in either case upon production of the decree or order adjourning further consideration or an office copy thereof, and an office copy of the chief clerk's certificate, or a memorandum of the date when such certificate was filed, indorsed on the request by the Clerk of Reports. The request may be in form following, that is to say:

"In Chancery,

"A. *v.* B.

"I request that this cause, the further consideration whereof was adjourned by order of the day of may be set down for further consideration before his Honour the Vice-Chancellor Kindersley."

Rule 11. Solicitor to attend at hearing.

11. *The solicitors for the several parties in all causes and matters shall attend in Court when such causes and matters are appointed to be heard and during the hearing thereof.*

Rule 12. Where cause cannot proceed through neglect or omission of solicitor.

12. *Where, upon the hearing of any cause or other matter, it appears that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which according to its practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court shall think fit to award.*

Costs.

Solicitor when ordered to pay costs personally.

See *Cook* v. *Broomhead*, 16 Ves. 133, where a solicitor having undertaken to appear for a defendant at the hearing was ordered to pay all the costs occasioned by his neglect to do so; and *Courtney* v. *Stock*, 2 Dr. & War. 251; but as to cases of illness, &c., see note to r. 19, p. 545, *infra*.

Rule 13. No pleas, &c., to stand over to indefinite period.

13. *No pleas, demurrers, exceptions, causes, further directions, further considerations, rehearings or appeals shall be allowed to stand over to an indefinite period.*

Defendant has option in default of plaintiff to

4. Subject to the provisions of the following rules, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court

or judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in rule 2; and in such case the plaintiff, on giving notice within the time fixed by rule 3 that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried.

give notice of trial,

4A. The defendant, instead of giving notice of trial, may apply to the Court or judge to dismiss the action for want of prosecution; and, on the hearing of such application, the Court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or judge may seem just (*f*).

or move to dismiss for want of prosecution,

(*f*) The second part of the rule, marked 4A, was added by r. 13 of June, 1876, and is grounded on r. I of Cons. Ord. XXI.

5. In any case in which neither the plaintiff nor defendant has given notice under the preceding rules that he desires to have the issues of fact tried before a judge and jury, or in any case within the 57th section of the Act (*g*), if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a judge for an order to that effect, within four days (*h*) from the time of the service of the notice of trial, or within such extended time as a Court or judge may allow.

except when jury is asked for, either party may apply within four days to change the mode of trial.

(*g*) *I.e.*, where scientific examination is required, so that the action is proper to be tried by referees.

(*h*) Where the application was not made within the four days the Court refused it (*Lascelles* v. *Butt*, L. R. 2 C. D. 588).

6. Subject to the provisions of the preceding rules, the Court or a judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

Trial of different questions of fact in different modes.

7. Every trial of any question or issue of fact by a jury

Single judge to try issues of fact.

Order XXXVI.

shall be held before a single judge, unless such trial be specially ordered to be held before two or more judges.

Notice of trial.

8. Notice of trial shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is *to be** entered for trial. It may be in the form No. 14 in Appendix (B),† with such variations as circumstances may require.

* The words *to be* were inserted by Rule 12 of Dec. 1875.

† Appendix of forms, *post.*

Notice of trial.

9. Ten days notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a judge. Short notice of trial shall be four days' notice.

Entering for trial

10. Notice of trial shall be given before entering the action for trial.

10A. Unless within six days after notice of trial is given the cause shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This rule is not to apply in any case in which notice of trial has been already given, or to trials not in London or Middlesex (*i*).

(*i*) The latter part of this rule, marked 10A, was added by r. 13 of Dec., 1875.

in London and Middlesex

11. Notice of trial for London or Middlesex shall not be or operate as for any particular sittings, but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list.

or elsewhere.

12. Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given.

Where countermanded.

13. No notice of trial shall be countermanded, except by consent, or by leave of the Court or a judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just.

Omission to enter for trial.

14. If the party giving notice of trial for London or Middlesex omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice

has been given may, unless the notice has been countermanded under the last rule, within four days enter the action for trial.

Where both parties enter for trial.

15. If notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.

Lists of actions.

16. The list or lists of actions for trial at the sittings in London and Middlesex respectively shall be prepared and the actions shall be allotted for trial without reference to the division of the High Court to which such actions may be attached.

Copies of pleadings for use of judge.

17. The party entering the action for trial shall deliver to the officer (*k*) *two copies* * of the whole of the pleadings in the action, *one of which shall be* * for the use of the judge at the trial. Such copies shall be in print, except as to such parts (if any) of the pleadings as are by these rules permitted to be written.

* The words in italics were added by r. 14 of Dec. 1875.

(*k*) *I.e.*, the registrar, see Cons. Ord. XXI. r. 2, p. 540, *ante*.

When defendant makes default at trial.

18. If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him (*l*).

(*l*) Cons. Ord. XXIII. r. 12 was similar. See the cases of *Hakewell* v. *Webber*, 9 Hare, 541; *Browne* v. *Smith*, 5 Jur. 1195; *Hughes* v. *Jones*, 26 Beav. 24, decided upon it.

Cons. Ord. XXIII. r. 12.

When plaintiff makes default at trial.

19. If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action (*m*), but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him.

(*m*) Under the old practice, before a bill was dismissed for default, an affidavit of service of *subpœna* to hear judgment had to be produced (*Rigg* v. *Wall*, 3 M. & Cr. 505; but see *Charlton* v. *Allen*, 9 Hare, App. lxvii; *Bell* v. *Hornby*, 14 Beav. 439).

Action dismissed pleaded in bar to another action.

By Cons. Ord. XXIII. r. 13, dismissal by plaintiff's application or default was equivalent to dismissal on the merits, and could be pleaded in bar to another suit for the same matter.

When the plaintiff did not appear by reason of illness of the solicitor and the action was dismissed, it was restored on payment of the costs of the day.

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and of the application to restore, *Birch* v. *Williams*, W. N. (1876) 168, 24 W. R. 700. As to costs occasioned by counsel not appearing, see *Goodson* v. *Hall*, 7 Cl. & Lin. 549.

Non-appearance of solicitor or counsel. Setting aside judgment obtained in absence of other party.

20. Any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex.

Adjournment of trial.

21. The judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms (if any) as he shall think fit (*n*).

Registrar's regulations, March 15, 1860. Adjournment, causes standing over.

(*n*) By the Registrar's Regulations of March 15, 1860, rr. 13, 14, it is provided as follows:—

"Upon production to the registrar of a request or consent signed by the solicitors of all parties, at the latest in the forenoon of the day before the day the cause is to be in the paper, it will be marked as standing over to a day to be named. If all parties do not consent, application should be made to the Court for that purpose at the latest in the forenoon of the day before the day the cause is to be in the paper; otherwise, if the cause be placed in the paper and called on, it may be struck out, and in that case it must be again set down at the bottom of the list."

Petitions standing over.

"Where an unopposed petition is directed to stand over without fixing a day for it to be again put into the paper, the registrar in attendance in Court, upon the written request of the solicitor, will direct the same to be restored to the paper for the following petition day."

Cons. Ord. XL. r. 22, Costs of day.

Compare Cons. Ord. XL. r. 22, by which—

"Where a cause, being in the paper for hearing, is ordered to be adjourned upon payment of the costs of the day, the party to pay the same, whether before the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, shall pay the sum of ten pounds, unless the Court shall otherwise direct."

See as to the costs of the day, *Caddick* v. *Cook*, 32 Beav. 70; *Till* v. *Brown*, 2 Bro. C. C. 276; *Farmer* v. *Curtis*, 2 Sim. 466.

Judgment.

22. Upon the trial of an action, the judge may, at or after such trial, direct that judgment be entered for any or either party, as he is by law entitled to upon the findings, and either with or without leave to any party to move to set aside or vary the same, or to enter any other judgment, upon such terms (if any) as he shall think fit to impose; or he may direct judgment not to be entered then, and leave

Leave to move to set aside.

any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or judge.

Who to enter judgment at assizes, &c.

23. Upon every trial at the assizes, or at the London and Middlesex sitting of the Queen's Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate shall enter all such findings of fact as the judge may direct to be entered, and the directions (if any) of the judge as to judgment, and the certificates (if any) granted by the judge, in a book to be kept for the purpose.

24. If the judge shall direct that any judgment be entered for any party absolutely, the certificate of the associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the form No. 15 in Appendix (B) hereto.

25. If the judge shall direct that any judgment be entered for any party subject to leave to move, judgment shall be entered accordingly upon the production of the associate's certificate.

Option of judge not to send action to jury;

26. The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury (*o*).

(*o*) In *Swindell* v. *Birmingham Syndicate*, 24 W. R. 911, W. N. (1876) 188, 217, this discretion was exercised.
One counsel only will be heard on each side on a question of fact, *Connington* v. *Gilliat*, L. R. 2 C. D. 694.

or to direct trial by jury.

27. The Court or a judge may, if it shall appear either before or at the trial that any issue of fact can be more conveniently tried before a jury, direct that such issue shall be tried by a judge with a jury (*p*).

(*p*) See note (*c*), p. 39, *ante*, and *Clarke* v. *Cookson* there cited. It was held in *Williams* v. *Guest*, L. R. 10 Ch. 467, that an appeal would lie from an order of a judge directing an issue before a jury.

Trial with assessors.

28. Trials with assessors shall take place in such manner and upon such terms as the Court or a judge shall direct.

Trial of issues of fact or

29. In any cause the Court or a judge of the division to

Order XXXVI. Trial.

which the cause is assigned may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 29th section of the said Act, or at the sittings to be held in Middlesex or London,† and such question or issue shall be tried and determined accordingly.

involving fact before commissioners.

† See note (*c*) p. 39, *ante*.

Official referees and distribution of business among them.

29A. The business to be referred to the official referees appointed under the Supreme Court of Judicature Act, 1873, shall be distributed among such official referees in rotation by the clerks to the registrars of the Supreme Court, Chancery Division, in like manner in all respects as the business referred to conveyancing counsel appointed under the Act of the 15 & 16 Vict. c. 80, s. 41, is directed to be distributed* by the second of the Consolidated General Orders of the Court of Chancery (*q*).

* See p. 134, *ante*.

(*q*) This and the next two rules were added by rr. 14—16 of May, 1876. The practice of referring questions to the referees, is assimilated to that of reference to arbitrators under the old practice, see note (*f*) to sect. 59 of the Judicature Act, 1873, p. 358, *ante*. And see also sect. 56 of the Act, p. 356, *ante*, by which the Court may adopt the report; sect. 58, by which the report is equivalent to a verdict only; but an action *may* be referred for decision, not subject to reviewal, instead of being referred only for report, see *Cruikshank* v. *Floating Swimming Bath Co.* (*Limited*), L. R. 1 C. P. Div. 264.

Order of referring business to official referee.

29B. When an order shall have been made referring any business to the official referee in rotation, such order, or a duplicate of it, shall be produced to the registrar's clerk, whose duty it is to make such distribution as aforesaid; and such clerk shall (except in the case provided for by Rule 29C of this order), endorse thereon a note specifying the name of the official referee in rotation to whom such business is to be referred; and the order so endorsed shall be a sufficient authority for the official referee to proceed with the business so referred.

Reference to special referee by judge.

29C. The two last preceding rules of this order are not to interfere with the power of the Court, or of the judge at chambers to direct or transfer a reference to any one in particular (*r*) of the said official referees, where it appears to the Court or judge to be expedient, but every such reference or transfer shall be recorded in the manner mentioned in rule 2 of the second of the said Consoli-

dated General Orders, and a note to that effect be endorsed on the order of reference or transfer; and in case any such reference or transfer shall have been or shall be made to any one in particular of the said referees, then the clerk in making the distribution of the business, according to such rotation as aforesaid, shall have regard to any such reference or transfer.

(*r*) For form of reference to a special referee, see *Broder* v. *Saillard*, L. R. 45 C. D. 692, L. J. Ch. 414; and where the parties do not consent, see *Rowcliffe* v. *Leigh*, 24 W. R. 782; *Lascelles* v. *Bate*, L. R. 2 C. D. 588.

Place and mode of trial before referee.

30. Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the Court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a judge, proceed with the trial *de die in diem* (*s*), in a similar manner as in actions tried by a jury.

(*s*) The parties acquiesced in non-compliance with this direction in *Robinson* v. *Robinson*, 24 W. R. 675.

Evidence before referee.

31. Subject to any order to be made by the Court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpœna, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a judge of the High Court, but not so as to make the tribunal of the referee a public court of justice.

Authority of referee.

32. Subject to any such order as last aforesaid, the referee shall have the same authority in the conduct of any reference or trial as a judge of the High Court when presiding at any trial before him (*t*).

(*t*) See note (*q*) *supra*, and r. 34, *infra*, as to the effect of the referee's report, and Ord. XL. rr. 2, 3, 5, as to his judgment.

Not to include power of committal.

33. Nothing in these rules contained shall authorise any referee to commit any person to prison or to enforce any order by attachment or otherwise.

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Referee may submit question to the Court.

34. The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct; and the Court shall have power to require any explanation or reasons from the referee (*u*), and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee (*x*).

Court may remit question to referee.

Fees of official referees.

(*u*) The referee acts in a *quasi* judicial capacity and is not to be examined in the action, *Broder* v. *Saillard*, L. R. 2 C. D. 692, 45 L. J. Ch. 414.

(*x*) The fees to be taken by the official referees were settled by the order 1 Feb., 1876, and are to be one guinea an hour with costs of locomotion, and fixed costs of 2*l.* 6*s.* 6*d.* for subsistence for every night the official referee and his clerk are absent from London, and when the sittings are not in London, the plaintiff is to provide a place for them.

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ORDER XXXVII.

Evidence Generally.

Evidence to be *vivâ voce*, except by agreement or order of Court.

I. In the absence of any agreement between the parties (*a*), and subject to these rules, the witnesses at the trial of an action or at any assessment of damages, shall be examined *vivâ voce* and in open court (*b*), but the Court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit (*c*), or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

Examination of witness before commissioner or examiner.

Agreement to take evidence by affidavit.

(*a*) As to consents to procedure by guardians *ad litem*, see note (*g*), p. 476. *ante*. The agreement here spoken of must be in writing, *New Westminster Brewery Company* v. *Hannah*, L. R. 1 Ch. Div. 278.

The Court has jurisdiction to direct a party who unreasonably refuses to consent to have the evidence taken by affidavit to pay the costs of the parties who moved for leave to do so, *Patterson* v. *Wooler*, L. R. 2 Ch. Div. 586.

(*b*) Oaths are to be administered in a reverent manner, Cons. Ord. XIX. r. 14.

(*c*) As to what facts are allowed to be proved in causes by affidavit, see the 28th section of Sir Geo. Turner's Act, p. 118, *ante*.

Refusal to consent to affidavit evidence.

2. Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit (*d*).

Affidavit evidence on motion, petition, or summons.

Attendance for cross-examination

(*d*) See as to what affidavits are open to cross-examination, note to 15 & 16 Vict. c. 86, s. 40, p. 185, *ante*.

As to the costs of producing such witness, see Ord. XXXVIII. r. 4, *infra*, altering r. 19 of the order of 5th Feb., 1861.

Order Feb., 1861, r. 19. Costs of producing witness.

The order as to evidence of Feb. 1861, provided (rule 22) as follows :—

Ord. Feb., 1861, r. 22. Notice to party whose witness it is intended to cross-examine.

Any party in any [cause or] matter requiring the attendance of any witness, whether a party or not, before the Court, or before one of the examiners of the court, or a special examiner, for the purpose of being examined, or of being cross-examined, shall give to the opposite party forty-eight hours' notice at least of his intention to examine or cross-examine such witness; such notice to contain the name and description of the witness, and the time and place of such examination or cross-examination, unless the Court shall in any case think fit to dispense with such notice.*

* As to causes, see Ord. XXXVIII. r. 4, *infra*.

The witness is entitled to reasonable notice according to circumstances, see *North Wheal Exmouth Mining Company*, 31 Beav. 628.

Notice to the witness.

Notice had to be given to a defendant of notice to cross-examine a co-defendant, *Pennell* v. *Davison*, 14 W. R. 174.

The strictness of the rule has been relaxed where it worked injustice, *De Brito* v. *Hillel*, L. R. 15 Eq. 213.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted (*e*). The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same (*f*).

What may be ground of affidavit.

Order XXXVII. Evidence.

(*e*) See *Bird* v. *Lake*, 1 H. & M. 111 ; *Woodhatch* v. *Freeland*, 11 W. R. 398, and see *notes* to next order as to the form of affidavits.

(*f*) See Additional Rules (as to costs) of August, 1875, clause 18, cited p. 488, *ante*.

Order for examination of witness or for taking depositions.

* *Sic.*

4. The Court or a judge may, in* cause or matter where it shall appear necesssary for the purpose of justice, make any order for the examination upon oath (*g*) before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court (*h*), and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct (*i*).

Examination of unwilling witness.

(*g*) In a summons under the Vendor and Purchaser Act, 1874, Jessel, M. R., made an order for examination before an examiner of a witness who refused to make an affidavit (*Re Springall*, W. N. 75, 225): compare the provisions of the Perpetuation of Testimony Act, p. 1, *ante*.

Order to be filed though irregularly taken.

(*h*) An examination taken before a special examiner, though not taken down in his own handwriting in accordance with 15 & 16 Vict. c. 86, s. 32, *ante*, p. 179, was ordered to be filed, *Bolton* v. *Bolton*, L. R. 2 C. D. 217 ; 34 L. T. N. S. 123.

Cons. Ord. XIX. rr. 4 and 5.

(*i*) The following rules as to using evidence taken in another branch of the Court are from Cons. Ord. XIX. rr. 4 and 5 :—

Decrees and depositions in other Courts.

Decrees in other courts may be read upon the hearing, without an order. But no depositions taken in any other court shall be read unless by order.

Order when made.

It would seem that the depositions here referred to must mean depositions taken in another branch of the Court of Chancery (see Daniell 802); for depositions made in many Courts are by statute made evidence on production of office copies : so that, notwithstanding *Lake* v. *Peisley*, L. R. 1 Eq. 173, 35 Beav. 125, an order of course to read in a suit in Chancery copies of a bill, order, decree, or affidavits, in a suit in the Court of the County Palatine, alleged to have been between the same parties, and directed to the same issue, was discharged as superfluous, *Stephenson* v. *Biney*, L. R. 2 Eq. 303 ; *Allen* v. *Bonnett*, L. R. 6 Eq. 562.

The order is made as of course, saving just exceptions, see Daniell, 807, *et seqq.* The true test seems to be whether the first suit raised the same issue, and was *virtually* between the same parties (*i.e.* between persons representing the same interests) as the first (*Lawrence* v. *Maule*, 4 Drew. 472 ; *Borough* v. *Whichcote*, 3 Bro. P. C. 595 ; *Coke* v. *Fountain*, 1 Vern. 413 ; *Eade* v. *Lingwood*, 1 Atk. 204 ; *Humphreys* v. *Pensam*, 1 M. & C. 580 ; *Mackworth* v. *Penrose*, 1 Dick 50). See, too, *Brown* v. *White*, 24 W. R. 456, where the relief sought was not identical.

If there has been opportunity to cross-examine.

The fact that the plaintiff in the second suit was only a co-defendant in the first suit will not prevent the Court from allowing the depositions of the witnesses in the first suit to be read if the party against whom they are to be read had an *opportunity of cross-examining the witnesses* (*Nevil* v. *Johnson*, 2 Vern. 447, and see *Poulterer's Company* v. *Askew*, 2 Ves. sen. 89, 90), and a plaintiff was allowed, seven months after he had given notice of motion for decree, to use the examination of the defendant taken in another cause, *Watson* v. *Cleaver*, 20 Beav. 137.

But where there has been no opportunity to cross-examine on affidavits,

they cannot be made evidence in another suit, *Williams* v. *Williams*, 12 W. R. 663; *Moore* v. *Harper*, 14 W. R. 306.

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An order was made to read in a suit evidence taken under a winding-up order to which the parties to the suit were privy, *Ernest* v. *Weiss*, 1 N. R. 6.

Though witnesses are not dead.

The order may be made though the witnesses whose evidence it is proposed to use are not dead, *City of London* v. *Perkins*, 3 Brow. Parl. Ca. 602; but see *Carrington* v. *Carnock*, 2 Sim. 567.

Rule 5. Order to use depositions in another cause to be available by opposite party.

Where either party, plaintiff or defendant, obtains an order to use depositions of witnesses taken in another cause, the opposite party may likewise use the same without motion, unless upon special reason, shown to the Court by the party obtaining such order, the opposite party be prohibited by the same order from so doing.

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Order XXXVIII. Affidavits.

Evidence by Affidavit.

Time for plaintiff's affidavits.

1. Within fourteen days after a consent (*a*) for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a judge in chambers may allow (*b*), the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof (*c*).

Consent in writing.

(*a*) See Ord. XXXVII. r. 1, *ante*, as to unreasonable refusal of such consent. The consent must be in writing, *New Westminster Brewery Company* v. *Hannah*, L. R. 1 Ch. Div. 278. As to consents by guardians *ad litem*, see note (*g*), p. 476, *ante*.

Enlarging time.

(*b*) As to enlarging the time for taking affidavits, see note to r. 3, *post*.

Affidavit in action not yet begun.

(*c*) Under the old practice no affidavit to be used at the hearing, even of a suit for an injunction, could be sworn *before* bill filed, *Francome* v. *Francome*, 13 W. R. 355; *Fennel* v. *Brown*, 18 Jur. 1051; but see *Young* v. *Brassey*, L. R. 1 C. D. 277, where an affidavit was allowed to be entitled in an action not yet begun, and in the matter of the Judicature Acts.

So in general affidavits to be used in support of a petition should be sworn after it is presented, *Re Western Benefit Building Society*, 33 Beav. 368; but where the petition was for payment of money out of Court, an affidavit sworn before the petition was presented, but after payment of the money in, was received, *Re Varley*, 14 W. R. 98; *Re Gombault*, W. N. (1869) 243.

Time for filing affidavits on interlocutory applications.

Affidavits to be used on motions or petitions may be filed up to the last moment before the hearing, *Munro* v. *Wivenhoe, &c., Railway Company*, 13 W. R. 880; *Ex parte Leicester*, 6 Ves. 429; *Jones* v. ——, 8 Ves. 46; *Electric Telegraph Company* v. *Nott*, 2 Coop. 67; where the hearing was postponed to give time to file them; see, however, *Clement* v. *Griffith*, Coop. 470. In a very special case affidavits filed after the motion was opened were admitted, *East Lancashire Railway Company* v. *Hattersley*, 8 Hare, 87; and see *Smith* v. *Swansea Dock Company*, 9 Hare, App. xx., and where

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an affidavit was filed too late for the hearing of a petition, it has been admitted on appeal, *Re Gibraltar and Malta Banking Company*, 13 L. T. N. S. 263.

Affidavits of service.

Affidavits of service must be filed at latest before the rising of the court on the day on which the application is made, *Lord Milltown* v. *Stuart*, 8 Sim. 34.

Form of affidavits.

The following are the rules as to the form of affidavits—

By 15 & 16 Vict. c. 86, s. 37, p. 182, *ante*, they are required to be divided into paragraphs.

Cons. Ord. XVIII.

Cons. Ord. XVIII. is as follows :—

Affidavits in first person.

1. *All affidavits shall be taken and expressed in the first person of the deponent.*

2. *Any solicitor, party, or person filing an affidavit not taken and expressed in the first person of the deponent shall not be allowed the costs of preparing and filing such affidavit in any taxation of costs.*

[Rules 3 and 4 are abrogated by Ord. 5 Feb., 1861, *infra*. p. 555.]

Rule 5. Affidavits to be filed in Record and Writs Office.

5. *Before any affidavit is exhibited in court or otherwise produced for the purpose of grounding any order, writ, process, or proceeding thereon, such affidavit shall be filed in the office of the Clerks of Records and Writs. And no order grounded upon an affidavit shall be drawn up unless the affidavit be first so filed, and an office copy thereof be produced.*

Office copies have been dispensed with in vacation, *Attorney-General* v. *Lewis*, 8 Beav. 179 ; but not otherwise, *Jackson* v. *Cassidy*, 10 Sim. 236 ; *Elsey* v. *Adams*, 4 Giff. 398.

The word affidavit includes an affirmation and attestation upon honour (Prel. Ord. 10 (6)).

Title of affidavit.

Correction of errors in title, &c.

An affidavit, if made in a suit, must be correctly entitled in the suit or matter (*May* v. *Prinsep*, 11 Jur. 1032 ; *Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338 ; *Salomon* v. *Stalman*, 4 Beav. 243, where a misnomer of the defendant in an affidavit of service was held a ground for discharging with costs the order obtained on the motion ; but see *Hawes* v. *Bamford*, 9 Sim. 653 ; *Re Varteg Ironworks Chapel*, 10 Hare, App. xxxvii. ; *Pearson* v. *Wilcox*, 10 Hare, App. xxxv., where affidavits erroneously entitled were allowed to be taken off the file and re-sworn without a fresh stamp ; *Fisher* v. *Coffey*, 1 Jur. N. S. 956 ; *Underwood* v. *Hannard*, W. N. (1871) 170 ; *Re Harris*, 7 Jur. N. S. 166 ; *Re Barnes*, 5 L. T. N. S. 587.

Affidavits made evidence in another matter.

Affidavits filed in a cause may be used in support of a petition in the cause, *Jones* v. *Turnbull*, 22 L. J. Ch. 1055 ; or, by leave of the Court, of a petition in a matter, *Re Pickance*, 10 Hare, App. xxxv. ; and see *Blackmore* v. *Glamorganshire Canal Company*, 5 Russ. 151.

An affidavit containing scandalous and irrelevant matter may be ordered to be taken off the file (*Goddard* v. *Parr*, 3 W. R. 633 ; *Kernick* v. *Kernick* 12 W. R. 335).

Form of affidavit.

Irregular affidavits, when admitted.

The form must be " I make oath and say," *Allen* v. *Taylor*, L. R. 10 Eq. 52, but affidavits sworn in America in the third person were received as evidence in *Re Husband*, 12 L. T. N. S. 303 ; *Dryden* v. *Frost*, 8 Sim. 380 ; and trifling irregularities have been overlooked, see *Gates* v. *Buckland*, 13 W. R. 67 ; *Mack* v. *Ward*, 10 Hare, App. i., but the signature of the party

cannot be dispensed with, *Anderson* v. *Stather*, 9 Jur. 1085 ; as to marksmen, see —— v. *Christopher*, 11 Sim. 409) ; nor the words "make oath," *Phillips* v. *Prentice*, 2 Hare, 542 ; *Re Newton*, 2 D. F. J. 3.

The order of 5, Feb. 1861, provided by rr. 18, 23, as follows :—

Ord. 5 Feb., 1861.

Form of affidavits

No affidavit filed on or after the first day of Easter Term, 1861, *shall be used in evidence on any proceeding in any cause or matter unless there be written at the foot thereof, at the time of filing the same, a memorandum stating by whom the same is filed, which memorandum shall be in the form following, or as near thereto as circumstances will admit (that is to say) : "This affidavit is filed on the part and behalf of the plaintiffs" (or "of the defendants M. & N.").*

to show means of knowledge.

Each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or of a motion for a decree or other motion, or on any other proceeding before the Court, or before the judge in chambers shall show the means of knowledge of the person making such statement.

Affidavits are to be printed, r. 6, *infra*, and sums of money are to be printed in words, *Re Watts*, 34 L. T. N. S. 647.

Ord. 16 May, 1862.

Affidavits to be printed.

2. The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a judge in chambers may allow (*d*), shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

Time for defendant's affidavits.

(*d*) As to enlarging the time, see note to r. 3, *infra*.

3. Within seven days after the expiration of the said fourteen days, or such other time as aforesaid (*e*), the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

Time for affidavits in reply.

(*e*) The time for filing affidavits and taking evidence may be enlarged in proper cases, see *Anderton* v. *Yates*, 15 Jur. 833; *Mayes* v. *Mayes*, 11 Jur. N. S. 1033 ; *Wragg* v. *Wragg*, 11 Jur. 701.

Time when enlarged.

Thus, where affidavits were filed just before the close of the time, containing charges as to which no issue had been raised in the pleadings, counter affidavits were allowed, *Scott* v. *Mayor of Liverpool*, 1 De G. & J. 369 ; and similar leave was given, the period for cross-examination being also enlarged, in *Phillips* v. *Warde*, 2 Jur. N. S. 33 ; and see *Hope* v. *Threlfall*, 1 Sm. & G. App. xxi. ; *Douglas* v. *Archbutt*, 23 Beav. 293. So the Court has a discre-

Cases of surprise.

For purpose of answering late affidavits.

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tion to allow such affidavits to be read at the hearing, *Boyse* v. *Colclough*, 1 K. & J. 124 ; *Thompson* v. *Partridge*, 4 D. M. G. 794 ; *Bayley* v. *Cass*, 10 W. R. 370 ; and the cause may be ordered to stand over, to give the other side time to answer them, *Heath* v. *Wallingford*, 12 L. T. N. S. 631.

or to explain them.

Where the Court gave a plaintiff leave, seven months after he had given notice of motion for decree, to use as evidence an examination of the defendant taken in another cause, the defendant was allowed to file affidavits in explanation, though the cause was in the paper, *Watson* v. *Cleaver*, 20 Beav. 137.

The Court has a discretion to allow one party to cross-examine the other's witnesses before filing his own affidavits, see *Morey* v. *Vandenburg*, 14 L. T. N. S. 542.

Not applied for *ex parte*.

The application for extended time should not be made *ex parte*, *Richards* v. *Curlewis*, 2 W. R. 481.

Leave was granted, after the time for closing evidence had passed, to file affidavits verifying extracts from a register of a Scotch Court of law, *McLachlan* v. *Lord*, 14 L. T. N. S. 98.

Production of deponent for cross-examination.

4. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production (*f*).

Expenses of producing witness.

(*f*) See before the rule *Richards* v. *Goddard*, L. R. 10 Ch. 288.

How to be compelled.

5. The party to whom such notice as is mentioned in the last preceding rule is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

Affidavits to be printed.

6. When the evidence in any action is under this order taken by affidavit, such evidence shall be printed (*g*), and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these rules provided after the close of the pleadings.

Notice of trial to follow.

Affidavits

(*g*) The order of 16th May, 1862, as to printing affidavits in causes is

superseded by this rule, and other affidavits are directed to be printed by Ord. III. of the Add. Rules, Aug. 1875, *post.* Order XXXVIII. Affidavits.

Evidence may be taken by affidavit *after notice of trial has been given* under a judge's order, notwithstanding this rule, *Waring* v. *Lacey*, 24 W. R. 318. after notice for trial.

Affidavits may be sworn to, partly in print and partly in manuscript, Ord. LVI. r. 3, *post.* Affidavits partly printed.

ORDER XXXIX. Order XXXIX.

Motion for New Trial.

1. "A party desirous of obtaining a new trial of any cause tried in the "Queen's Bench, Common Pleas, or Exchequer Divisions on which a "verdict has been found by a jury, or by a judge without a jury, must apply "for the same to a Divisional Court by motion for an order calling upon "the opposite party to show cause at the expiration of eight days from the "date of the order, or so soon after as the case can be heard, why a new "trial should not be directed. Such motion shall be made within four days "after the trial, if the Divisional Court is then sitting, or within the first "four days after the commencement of the sitting of the Divisional Court "next after the trial, or within such extended time as the Court or a "judge may allow." Motion for new trial.

2. "A copy of such order shall be served on the opposite party within "four days from the time of the same being made." Order to show cause.

3. "A new trial shall not be granted on the ground of misdirection or of "the improper admission or rejection of evidence, unless in the opinion of "the Court to which the application is made some substantial wrong or "miscarriage has been thereby occasioned in the trial of the action; and if "it appear to such Court that such wrong or miscarriage affects part only "of the matter in controversy, the Court may give final judgment as to "part thereof, and direct a new trial as to the other part only." (See *Marsh* v. *Isaacs*, 45 L. J. C. P. Div. 505.) New trial where substantial miscarriage

4. "A new trial may be ordered on any question in an action, whatever "be the grounds for the new trial, without interfering with the finding or "decision upon any other question." As to any question.

5. "An order to show cause shall be a stay of proceedings in the action, "unless the Court shall order that it shall not be so as to the whole or any "part of the action." Stay of proceedings.

ORDER XL. Order XL.

Motion for Judgment.

1. Except where by the Act or by these rules it is provided that judgment may be obtained in any other manner (*a*), the judgment of the Court shall be obtained by motion for judgment (*b*). Motion for judgment.

(*a*) As to moving for judgment under this rule, in suits commenced under the old practice, see *Oakes* v. *Brookes*, 24 W. R. 20. See as to trial of actions, Ord. XXXVI. r. 2; judgment may be given at such trial, *ibid.*, r. 22. This order provides for actions (such as adminis- Judgment following trial.

Order XL. Motion for judgment.

tration actions), where there is no issue to be tried, or for cases where the action has been tried and final judgment has not been given, or wrong judgment given, or where issues have been directed.

(*b*) The following notice has been issued as to the hearing of motions for judgment and of short causes—

Motion for judgment to be set down in cause book but can be heard as *short cause.*

"The Master of the Rolls and the Vice-Chancellors have given directions "that motions for judgment in actions shall not be brought on as ordinary "motions but shall be set down in the cause book.

"They can be marked short on production of the usual certificate of "counsel, and will then be placed in the paper on the first short cause day "after the day for which notice is given. If not marked short, they will "come into the general paper in their regular turn.

"It will be advisable that the notices of motion for judgment should, if "it is intended to mark them short, contain a statement to that effect, and "also a statement that no further notice will be given of their having been "so marked. Such statement will dispense with the necessity for giving "defendants further notice that motions for judgment have been marked "short.

"Where a defendant makes his defence and the plaintiff moves under "Order XL. r. 11, for such order as he is entitled to on the admissions of "the defendant, the action need not be set down, but if, on the motion "being made it appears that there must be a discussion or argument, it "may be ordered to go into the general paper subject to any order for its "being advanced.

"R. H. Leach, *Senior Registrar.*"

Motion for judgment on defendant's default.

See for cases where motions for judgment on defendant's default were heard short, note (*b*), p. 512, *ante*; delivery of statement of claim in such causes as are commonly heard short is generally unnecessary, but see note (*a*), p. 488, *ante.*

Evidence and statement of claim in short causes.

Where judgment was given at trial of action but leave given to move.

2. Where at the trial of an action the judge or a referee has ordered that any judgment be entered subject to leave to move (*c*), the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the judge in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved.

(*c*) See Ord. XXVI. rr. 22, 25.

Where no judgment was given at trial.

3. Where at the trial of an action the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

Where judgment

4. Where at the trial of an action before a jury the judge

has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be entered wrongly, with reference to the finding of the jury upon the question or questions submitted to them. Order XL. Motion for judgment. at trial was wrong.

5. Where at the trial of an action the judge or a referee has directed that any judgment be entered, any party may, without any leave reserved, move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong.

6. On every motion made under either of the last two preceding rules, the order shall be an order to show cause, and shall be returnable in eight days. The motion shall be made within four days after the trial if the divisional Court is then sitting, or within the first four days after the commencement of the sitting of the divisional Court next after the trial, or within such extended time as a Court or judge may allow. Order to show cause.

7. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner (*d*), the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties. Where issues have been directed and tried,

(*d*) See Ord. XXXVI. rr. 3, 4, 26, 27.

8. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders or sufficient issues tried.

Order XL. Motion for judgment.

it desirable that the trial or determination thereof should be postponed, may apply to the Court or a judge for leave to set down the action on motion for judgment, without waiting for such trial or determination (*e*). And the Court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

(*e*) Such leave is not given unless it is certain what issues are necessary to the decision of the action, *Republic of Bolivia* v. *National Bolivian Navigation Company*, 24 W. R. 361.

Time for moving for judgment one year.

9. No action shall, except by leave of the Court or a judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

Judgment to be given or issues directed or accounts and inquiries ordered.

10. Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration (*f*), and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.

Further consideration.

(*f*) As to setting down causes on further consideration, see Cons. Ord. XXI. rr. 9, 10, pp 541, 542, *ante*.

Where not necessary.

Where there was no further question of law to be tried, further consideration was not directed, but liberty was given to apply in chambers, *Gilbert* v. *Russell*, W. N. (1875) 225 ; and see note (*a*) to Ord. XXXIII., p. 528, *ante*.

Motion for judgment upon admissions in the pleadings.

11. Any party to an action may at any stage thereof apply to the Court or a judge for such order as he may, upon any admissions of fact in the pleadings (*g*), be entitled to, without waiting for the determination of any other question between the parties (*h*). The foregoing rules of this Order shall not apply to such applications, but any such application may be made by motion, so soon

as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a judge may, on any such application, give such relief, subject to such terms, if any, as such Court or judge may think fit.

Order XL. Motion for judgment.

(*g*) See Ord. XIX. r. 17, by which statements of facts in pleadings not denied shall be taken to be admitted; but see *Gillott* v. *Kerr*, 24 W. R. 428, where it was held that a motion for judgment against a defendant making default in pleading should be made under Ord. XXIX. r. 10, *ante*, and not under this rule.

Where defendant makes default in pleading.

An order against parties *not admitting* the facts pleaded may be moved for *at the same time* under Ord. XXIX. rr. 10, 11, *Re Smith, Bridson* v. *Smith*, W. N. (1876) 103, 24 W. R. 392.

Where some admit and some make default.

As to the jurisdiction to order a sale of real property on interlocutory application, see 15 & 16 Vict. c. 86, s. 55, *ante*, pt. I.; and to allow income of property pending an action, *ibid.*, s. 57; and to deliver up securities for interim protection, see *Rumsey* v. *Reade*, L. R. 1 Ch. Div. 643; and as to such interlocutory orders generally, see *Smith* v. *Peters*, L. R. 20 Eq. 511.

Interlocutory applications.

A trustee was ordered to bring a fund into Court in *Symonds* v. *Jenkins*, 34 L. T. N. S. 277.

(*h*) Where in an action for partition the plaintiff's title and that of the other parties had been admitted on the pleadings, the necessary inquiry as to the persons interested, for effecting a sale, was ordered on motion under this rule, *Gilbert* v. *Smith*, L. R. 2 Ch. Div. 686, 24 W. R. 568.

Inquiries in partition action.

No order can be made on a defendant's counter-claim under this rule apart from the plaintiff's claim, *Rolfe* v. *Maclaren*, L. R. 3 C. D. 106.

Where counter-claim admitted.

An application to stay proceedings was made under this rule on account of the matter belonging to the jurisdiction of another Court, *Jenney* v. *Bell*, L. R. 2. C. D. 547; but an application to dismiss an action on account of the plaintiff's admission should not be made under this rule, *Litton* v. *Litton*, 24 W. R. 962.

Application to stay proceedings.

A husband and wife having put in a joint defence, which, as regards the husband, raised no defence, it was held that the plaintiff was entitled to a final judgment against him, *Jenkins* v. *Davies*, L. R. 1 Ch. D. 696.

Causes can be heard "short" under this rule, see note (*b*) to r. 1, *ante*, p. 558.

Short causes.

Further consideration may be dispensed with by ordering accounts to be taken on an interlocutory motion, under this rule, or Order XXXIII. p. 523, *ante* (see *Turquand* v. *Wilson*, L. R. 1 Ch. Div. 85, where the defendants admitted a partnership, and that they had not accounted, but alleged that the plaintiff was indebted to them); or further consideration may be ordered on such motion, *Bennett* v. *Moore*, L. R. 1 C. D. 692; *Gilbert* v. *Smith*, L. R. 2 Ch. Div. 686, 24 W. R. 568 (a partition action), which see for form of order; or accounts may be directed to be taken in a district registry, *Brassington* v. *Cussons*, 24 W. R. 881.

Further communication dispensed with.

See as to the jurisdiction to make interlocutory orders auxiliary to the administration of justice at the hearing, *Smith* v. *Peters*, L. R. 20 Eq. 511.

As to the nature and extent of the "admissions" on which the Court will act, see *Symonds* v. *Jenkins*, 24 W. R. 512, V.-C. M., and cases there cited.

ORDER XLI.

Order XLI.

Entry of Judgment.

1. Every judgment shall be entered (*a*) by the proper officer (*b*) in the book to be kept for the purpose. The

Judgment how entered.

Order XLI. Entry of judgment.

party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts (if any) of the pleadings as are by these rules permitted to be written: Provided that no copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action. The forms in Appendix (D) hereto * may be used, with such variations as circumstances may require.

* Appendix of forms, *post.*

(*a*) An order of which there was no entry, and the original of which was lost, was directed to be redrawn in *Ex parte the Dean of St. Pauls*, 18 W. R. 724.

Cons Ord. I. r. 17. Registrars.

(*b*) The registrars are the "proper officers" in Chancery. Their duties as to entering and passing decrees are defined by Cons. Ord. I. rr. 17—33, as follows:—

Rule 17. Attendance of registrars.

17. *The registrars shall attend the several Courts of the Lord Chancellor, the Lords Justices of the Court of Appeal, the Master of the Rolls, and the three Vice-Chancellors, in rotation, week by week, on alternate days.*

Rule 18. Entry of decrees, orders, præcipes for attachments, and other documents.

18. *All decrees and orders drawn up by the registrars, or by the chief clerks to the judges, and all præcipes for attachments, and such other documents (if any) as, according to the present practice or the practice for the time being, ought to be entered by the entering clerks to the registrars, shall be entered by them without abbreviations, and in a clear and legible hand, under the direction of the senior registrar for the time being, within one clear day after the same shall be left for entry; and all such entries shall be examined by one of the said entering clerks, and be marked with his initials, to denote such examination.*

Rule 19. Indexes to such entries.

19. *Proper calendars or indexes of such entries shall be made by the said entering clerks, so that the same may be conveniently referred to when required. And such calendars or indexes, and the books in which such entries are made, shall, when completed, be transmitted to the Report Office, to be there preserved under the direction of the Clerks of Records and Writs, and shall, at all times during office hours, be accessible to the public on payment of the usual fee.*

To be accessible on payment of fees.

Order XLI. Entry of judgment.

20. *At the time of bespeaking a decree or order, the party bespeaking the same shall leave with the registrar his counsel's briefs, and such other documents as may be required by the registrar, for the purpose of enabling him to draw up the same.*

Rule 20. Counsel's briefs, &c., to be left with the registrar.

21. *Every decree or order shall be bespoken, and the briefs and such other documents as are mentioned in the next preceding rule shall be so left with the registrar within seven days after the decree or order is pronounced or finally disposed of by the Court.*

Rule 21. Decree or order to be bespoken, and documents left with registrar, within seven days after decree pronounced.

22. *In case any decree or order is not bespoken, and the briefs and other requisite documents are not left with the registrar within the time prescribed by the next preceding rule, the registrar may decline to draw up the decree or order without the leave of the Court.*

Rule 22. Consequence of default.

23. *At the time of delivering out the draft of any decree or order which requires to be settled by the registrar in the presence of the parties, the registrar shall deliver out, to the party on whose application the draft has been prepared, an appointment in writing of a time for settling the same.*

Rule 23. Time for settling draft, decree, or order to be appointed in writing.

24. *A copy of such appointment shall be served on the opposite party one clear day at least before the time fixed thereby for settling the draft, decree, or order; and the party serving such copy, and the party so served, shall attend such appointment, and produce to the registrar their briefs and such other documents as may be necessary to enable him to settle the draft.*

Rule 24. Service of a copy of such appointment on opposite party.

Attendance at the time appointed with briefs and documents.

An order drawn up in the absence of a defendant will not, unless error either of form or substance be shown, be set aside (*Smith* v. *Acton* (No. 2), 26 Beav. 559). A notice to draw up an order served one day for the next is regular (*Re Christmas*, 19 Beav. 519).

Order drawn up in absence of defendant.

25. *Service of such appointment shall be effected by leaving a copy thereof at the place for service of the party to be served, or by transmitting a copy thereof by the post to such party at such place for service.*

Rule 25. Appointment how served.

26. *At the time fixed for settling the draft, the original appointment, together with a memorandum indorsed*

Rule 26. Proof of service.

Order XLI. Entry of judgment.

thereon of the service of a copy thereof on the opposite party, and signed by a person by whom such service was effected, shall be delivered to the registrar, in order that he may be satisfied that service has been duly effected, but the registrar may require such service to be verified by affidavit.

Rule 27. Time for passing the decree or order to be named or appointed. Service of appointment.

27. *When the draft, decree, or order has been settled by the registrar, he shall name a time in the presence of the several parties, or else deliver out an appointment in writing of a time for passing the decree or order. And, in the latter case, such appointment shall be served on the opposite party, in like manner as directed by the 24th and 25th rules of this order, with reference to an appointment to settle the draft, decree, or order; and the original appointment, together with a memorandum indorsed thereon of the service of a copy thereof on the opposite party, and signed by the person by whom such service was effected, shall be delivered to the registrar, in order that he may be satisfied that service has been duly effected; but the registrar may require such service to be verified by affidavit.*

Proof of service to be produced to registrar.

Rule 28. Default in attending appointment with briefs and documents.

28. *If any party fails to attend the registrar's appointment for settling the draft of or passing any decree or order, or fails to produce his briefs and such other documents as the registrar may require to enable him to settle such draft or pass such decree or order, the registrar may proceed to settle the draft or pass the decree or order in his absence, and the registrar shall be at liberty to dispense with the production of counsel's briefs, and to act upon such evidence as he may think fit of the actual appearance by counsel of the party failing to attend or to produce such documents or papers as aforesaid, or may require the matter to be mentioned to the Court.*

See *Yeatman* v. *Read*, 14 W. R. 123, for a motion under this rule.

Rule 29. [Rule 29 gives the form of the registrar's appointment.]

Rule 30. Filing of appointment.

30. *The registrar's appointments, with the indorsements (if any) thereon, shall be filed by the registrar.*

Order XLI. Entry of judgment.

Rule 31. Adjournment of appointment.

31. *The registrar may adjourn any appointment for settling the draft of or passing any decree or order, to such time as he may think fit; and the parties who attended the appointment shall be bound to attend such adjournment without further notice.*

Rule 32. Settling or passing decree or order without appointment or notice.

32. *Notwithstanding the preceding rules of this order, the registrar shall be at liberty, in any case in which he may think it expedient so to do, to settle and pass the decree or order without making any appointment for either purpose, and without notice to any party.*

Rule 33. Meetings of registrars.

33. *The registrars shall from time to time meet, and consider such orders, rules, or regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in their office, and report such orders, rules, or regulations to the Lord Chancellor, to the end that, if the same be approved by him, proper steps may be taken for such orders, rules, or regulations being adopted and duly made general orders, rules, or regulations of the Court.*

Date of judgment pronounced in Court.

2. Where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced (*d*), and the judgment shall take effect from that date.

(*d*) See *Re Risca Coal Company*, 10 W. R. 701, where the decision was in accordance with the rule in the text.

Where documents are to be left.

3. In all cases not within the last preceding rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

Where affidavits are to be filed.

4. Where under the act or these rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required he shall enter judgment accordingly.

Order XLI. Entry of judgment.

Rule 5. Where certificates are to be made, or writ returned.

5. Where by the act or these rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

Rule 6. Effect of nonsuit.

6. Any judgment of nonsuit, unless the Court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a judge shall seem just.

The Cons. Ord. XXIII. (Decrees and Orders) still applies to the Chancery Division.

CONSOLIDATED ORDER XXIII.

DECREES AND ORDERS.

Rule 1. Meaning of the words "The Judge," "The Taxing Master," "The Clerk of Records and Writs," in a decree or order.

1. *In any decree or order where the words "The Judge" are used, such expression shall mean the judge to whose court the cause or matter wherein such decree or order is made is for the time being attached. Where the words "The Taxing-Master" are used, such expression shall mean the taxing-master in rotation, or, in case any previous reference shall have been made, the taxing-master to whom the cause or matter stands referred, as the case may be; and where the words "The Clerk of Records and Writs" are used, such expression shall mean the Clerk of Records and Writs in whose division the cause or matter wherein such order is made, is.*

Rule 2. Form of decrees and orders.

2. *It shall not be necessary in drawing up any decree or order, to insert the year of the Sovereign, or to recite any of the pleading or any part of the petition or notice of motion, as the case may be, or any previous decree or order in the cause or matter, or any report, certificate, affidavit, or other document that has been, or before the decree or order is completed shall be, filed or recorded in the court; but it shall be sufficient to refer thereto save*

only that in matters of contempt, or where the decree or order varies from some general rule, and in such other cases as the Court shall direct or the registrar shall in his discretion see fit, the registrar shall make such short recitals as may be necessary to show the grounds on which the decree or order is granted.

Order XLI. Entry of judgment.

Cons. Ord. XXIII.

Where a plaintiff reads part of a defendant's answer, the whole answer is entered as read, and when a defendant is not called on, he is entitled to have all his evidence entered as read (*Manby* v. *Bewicke*, 3 Jur. N. S. 685). And all affidavits which have been filed, and which a party gives notice that he will read on the hearing of a motion, though not mentioned at such hearing, should be entered as read, *Catholic Publishing, &c., Company* v. *Wyman*, 1 N. R. 49.

Entering evidence, &c., as read.

Where a decree had been made by consent, and the papers necessary to be entered as read were not strictly proved, they were ordered to be so entered nevertheless, *Simmonds* v. *G. E. Ry.*, L. R. 3 Ch. 796.

Not to be entered as read *de bene esse.*

Evidence should not be entered as read *de bene esse* (*Parker* v. *Morrell*, 2 Phil. 453; *Watson* v. *Parker*, *ibid.* 5), not even by consent (*McMahon* v. *Burchell*, 2 Phil. 127), nor "saving just exceptions" (*Sherwood* v. *Beveridge*, 2 Coll. 536; *Drake* v. *Drake* (No. 1), 25 Beav. 641; but see *Gee* v. *Gurney*, 8 Beav. 315).

Where it does not appear by the registrar's minutes that any evidence was read, the Court will not, on a subsequent application, order evidence to be entered as read, *Bute* v. *Eden*, 1 Bro. P. C. 499.

[Rr. 3—9 relate to orders dealing with money in Court; see rules under the Chancery Funds Act, pp. 393—402, *ante.*]

[By rule 10 (altered and enacted as it now stands by the order of 7 Jan. 1870, under the Debtors Act, *ante*, p. 296), decrees and orders are to state the time for doing the act required.

When time not stated.

When the time is not stated, the decree or order is not thereby made ineffectual, but the Court on motion will fix a time (*Needham* v. *Needham*, 1 Hare, 633); "forthwith" is a sufficient expression of time, *Thomas* v. *Nokes*, L. R. 6 Eq. 521; *Re Nowell*, 11 W. R. 896.

It was held that in case of an irregular service the order might be served over again with a proper indorsement, *Re Gregg*, L. R. 9 Eq. 137.

11. *Where a defendant, at the hearing of a cause, objects that a suit is defective for want of parties, and has not by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court, if it shall think fit, may make a decree saving the rights of the absent parties.*

Rule 11. Decree saving the rights of absent parties.

What parties within rule.

Compare sects. 42 and 44 of 15 & 16 Vict. c 86, pp. 185, 189, *ante.*

A decree was under this rule made in the absence of the assignees of a bankrupt (*Maybery* v. *Brooking*, 7 D. M. G. 673); of the heir-at-law of a surviving trustee (*Faulkner* v. *Daniel*, 3 Hare, 199, and comp. *May* v. *Selby*, 1 Y. & C. C. C. 235); of a mortgagee (*Fulton* v. *Clark*, 1 De G. & Sm. 307); of a person entitled upon a remote contingency (*Daubuz* v. *Peel*, 1 Coop. Rep. temp. Cottenham, 365).

Order XLI. Entry of judgment.

But the husband of a female plaintiff or defendant was not within the rule (*Russell* v. *Lucy*, 18 L. J. Ch. 464); nor a debtor who had assigned his property in trust for his creditors, *Kimber* v. *Ensworth*, 1 Hare, 293.

Cons. Ord. XXIII.

[Rule 12 related to the effect of a decree made on defendant's default at the hearing (see now Ord. XXXVI. r. 18, p. 545, *ante*).]

[Rule 13 related to plaintiff's default at the hearing (see now Ord. XXXVI. r. 19, p. 545, *ante*) and to his dismissal of his own bill (see now p. 499, *ante*, as to discontinuance).]

[Rules 14—16 related to the ordinary decree for inquiries and accounts (see now Ord. XXXIII., and notes, p. 528, *ante*).]

Rule 17. Drawing up, passing, and entering of orders on petitions of course.

17. *With a view to the convenience of the suitors and their solicitors, and for the purpose of diminishing the expense of orders on petitions of course which, according to the practice of the Court, may be presented to the Master of the Rolls, one of the secretaries of the Master of the Rolls shall, upon any such petitions of course (except upon petitions for setting down causes to be reheard) which shall be presented to his honour, instead of answering such petitions, draw up the orders thereon in such form as the Master of the Rolls shall from time to time direct, every such order to be signed as passed with the initials of such secretary; and the under secretary shall enter, or cause to be entered, every such order in a book to be kept at the secretary's office at the Rolls for that purpose, and shall then mark and sign such order with his initials, as entered; and the suitors of the Court and their solicitors shall have access to the said book, during office hours, without the payment of any fee. And every such order so to be made as aforesaid shall have the same force and effect as orders of course passed by the registrars have.*

See further as to orders of course, Cons. Ord. VI. rr. 9—10, p. 445, *ante*.

Rule 18–20. Service of notice of decree.

[Rules 18—20, relating to service of notice of decree, will be found p. 188, *ante*.]

Rule 21. Clerical mistakes corrected.

21. *Clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission, may at any time* before inrolment* *be corrected upon motion or petition without the form and expense of a rehearing.*

Where the order was made at chambers, the application to correct it is usually by summons.

* Inrolment is now obsolete. See *Hastie* v. *Hastie*, cited p. 570, *infra*.

Order XLI. Entry of judgment.

The registrars in drawing up orders, &c., may by consent introduce such alterations as the judge would in his opinion sanction, see *Davenport* v. *Stafford*, 8 Beav. 503, 511 ; *Phillips* v. *Gibbons*, 1 V. & B. 84, 6. *Taylor* v. *Milner*, 10 Ves. 444.

Alterations in judgments. What corrections not within rule.

The rule does not extend to the omission of any term which could only have been introduced under the express judgment of the Court (*Bird* v. *Heath*, 6 Hare, 236 ; and see *Fyler* v. *Fyler*, 1 Coll. 93 ; *Dodson* v. *Sammell*, 8 W. R. 252), or to any alteration which is equivalent to a new direction (*Colman* v. *Sarell*, 2 Cox, 206 ; *Willis* v. *Parkinson*, 3 Swanst. 233 ; *Brookfield* v. *Bradley*, 2 S. & S. 64 ; *Champernowne* v. *Brooke*, 9 Bligh, N. S. 199).

But an accidental slip (*Turner* v. *Hodgson*, 9 Beav. 265), *ex. gr.*, the omission of the usual direction to settle the conveyance, may be supplied by petition under it (*Trevelyan* v. *Charter*, *id.* 140) ; and see *Hughes* v. *Jones*, 26 Beav. 24, where a decree for specific performance having been made against the defendant (who made default) without a reference as to title, the Court, on the motion of the defendant, ordered a reference as to title to be inserted in the decree, the defendant paying the costs of the application.

What corrections are within the rule.

In *Jefferys* v. *Smith*, 11 W. R. 479, the words "survivors or survivor" were added to a decree for payments to four executors, and the words "executor and administrator" in *Ex parte Straight*, 16 W. R. 661 ; *Andrews* v. *Bohannon*, W. N. (1869) 80; in *Re Tiel*, 11 W. R. 351, a decree, though passed and entered, was altered on motion, the plaintiff, who was directed by the decree to pay costs, having been dead when the decree was pronounced ; see *Pennell* v. *Millar*, 23 Beav. 172 ; *Moore* v. *Walter*, 11 W. R. 713 ; *Viney* v. *Chaplin*, 3 De. G. & J. 282. In *Askew* v. *Peddle*, 14 Sim. 301, a mistake in a decree was corrected, although it had been pronounced seven years, and the case had been heard on further directions.

Where a person to whom money was ordered to be paid was described as "widow," she being in fact married again, the error was rectified under this rule, *Re Robinson*, W. N. (1873) 28.

Applying on minutes.

Where a party has liberty given him to apply to the Court on the minutes of a decree, he must do so within a fortnight, After that time, notice of motion, specifying the variations sought to be introduced, must be regularly given (*Hood* v. *Cooper*, 26 Beav. 373 ; see further, notes to Ord. XXXIII. and XXXIV.). See, too, *Prince* v. *Howard*, 14 Beav. 203.

Rule 22. Non-performance of condition on which decree has been obtained.

22. *Where any person who has obtained any decree or order upon condition, does not perform or comply with such condition, he shall be considered to have waived or abandoned such decree or order so far as the same is beneficial to himself: and any other person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the decree or order may in such case warrant, or such proceedings as might have been taken if no such decree or order had been made, unless the Court shall otherwise direct.*

Rule 23. No order on petition, &c., filed until original petition, &c., filed.

23. *No order made on a petition, and no order to make a submission to arbitration or an award an order of the Court, and no decree or order wherein any written admissions of evidence are entered as read, shall be passed, until the original petition, submission to arbitration, award, or written admissions of evidence, shall have been filed in*

Order XLI. Entry of judgment.

the Report Office, and a note thereof made on the decree or order by the Clerk of Reports.

[Rr. 24—9 provided for the inrolment of decrees, "now a useless ceremony," per James, L. J., in *Hastie* v. *Hastie*, L. R. 2 C. D. 307.]

Order XLII.

ORDER XLII.

Execution.

Process to enforce judgment for recovery of money.

1. A judgment for the recovery by or payment to any person of money (*a*) may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof.

(*a*) See sect. 4 of the Debtors' Act, p. 294, *ante*, and r. 3 under the Act, p. 297, *ante*.

Judgment for payment of money into Court.

†Ord. XLVII.

‡ Ord. XLIV.

2. A judgment or the payment of money into Court may be enforced by writ of sequestration,† or in cases in which attachment is authorised by law, by attachment.‡

For recovery of land.

§ Ord. XLVIII.

3. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.§

Of other property.

‖ Ord. XLIV. and XLVII.

4. A judgment for the recovery of any property other than land or money may be enforced:

By writ for delivery of the property;

By writ of attachment;‖

By writ of sequestration.‖

Of judgment or order requiring act to be done or abstained from.

5. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal (*b*).

Sequestration, attachment, committal.

(*b*) Sequestration of estate and effects is also permitted, see Ord. XLVII., *post*. When the notice of motion was for an order to commit, it was held that an order for attachment could be made, *Piper* v. *Piper*, W. N. (1876) 202.

Committal for contempt.

See as to committal for contempt, note (*a*), p. 295, *ante*. The order under the Debtors' Act provides (p. 298, *ante*) for a writ of attachment to enforce orders to do any act.

Cons. Ord. XXX. r. 1.

See also Cons. Ord. XXX. which provides as follows:—

Every suitor who prosecutes a contempt shall use

his best endeavour to procure each process to be duly served and executed upon the party prosecuted; otherwise he shall pay costs unto the party aggrieved, and lose the benefit of the process returned.

Cons. Ord. XXX.

Rule 1. Executing of process of contempt.

After any order for a serjeant-at-arms shall be granted by the Court, the registrar shall on request draw up the said order, and deliver the same to the serjeant-at-arms or his deputy, who shall thereupon endeavour to apprehend the party prosecuted and bring him into court to answer his contempt, if he can. But if he cannot, no such order for a serjeant at-arms shall be discharged, nor the contempt thereupon, without a certificate under the hand of the serjeant-at-arms that his fees have been paid. And after the said order shall have been so drawn up and passed, no private or other agreement shall be made between the party prosecuting the contempt and the person standing in contempt, or on their behalf, for a compromise of the suit or discharge of the contempt, unless such satisfaction shall be made, and a certificate thereof shall be produced to the Court.

Rule 2. Order for serjeant-at-arms to be drawn up and delivered to the serjeant. Payment of fees.

Private agreement.

[By Cons. Ord. XXIX. r. 4, a person committed or brought up by sergeant-at-arms is not to be released until he has performed the decree or given security to do so.]

Where a party is brought up to this Court by virtue of any writ of habeas *duly issued from the office of the Clerks of Records and Writs, and by reason of the pressure of other business, or from any other cause, the hearing of the cause or matter in which such party is concerned is postponed to a future day, a new writ of* habeas *may be issued for such future day, if the Court shall so direct without payment of any fee.*

Rule 3. New writ of habeas.

[Rules 4 and 5 abolished the older writs of execution and rebellion.]

6. In these rules the term "writ of execution" shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case.

Writ of execution.

Order XLII. Execution.

Where judgment is upon conditions.

7. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution against such party. And the Court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.

Leave for execution after demand made.

Execution against partners.

8. Where a judgment is against partners in the name of the firm, execution may issue in manner following:

(*a.*) Against any property of the partners as such;

(*b.*) Against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner;

(*c.*) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

Issue of writ of execution.

9. No writ of execution shall be issued without the production to the officer by whom the same should be issued, of the judgment (*c*) upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

(c) As to the writ in the case of discontinuance where there is no judgment, see rule 2* of Ord. XXXIII., p. 500, *ante*.

Præcipe for writ.

10. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose. The præcipe shall contain the title of the action, the reference to the record, the date of the judgment (*d*), and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods the execution is to be issued; and shall be signed by *or on behalf of* the solicitor* of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E) hereto may be used with such variations as circumstances may require.

* The words in italics were added by r. 17 of May, 1876.

(*d*) See note (*a*) *supra*.

Name of solicitor or party suing out writ to be endorsed on writ.

11. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

Date of issue.

12. Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (F) hereto may be used, with such variations as circumstances may require.†

† Appendix, *post*.

Expenses of execution.

13. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered (*e*).

(*e*) See 15 & 16 Vict. c. 76, s. 123; Chitty's Statutes, vol. III. p. 741, and *Abud* v. *Riches*, L. R. 2 C. D. 528 (cited in note to Ord. XLIV. r. 2), as to the costs of attachment.

Writ for recovery of money to

14. Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff, or other

Order XLII. Execution.

officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum (*f*) from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

state amount and interest.

(*f*) Compare Cons. Ord. XLII. rr. 9—11, as to interest (cited, *ante*, p. 152).

When writ under judgment for money may be sued out.

15. Every person to whom any sum of money or any costs shall be payable under a judgment, shall immediately after the time when the judgment was duly entered (*g*), be entitled to sue out one or more writ or writs of fieri facias or one or more writ or writs of elegit (*h*) to enforce payment thereof, subject nevertheless as follows :

(*a.*) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period (*i*).

Judge may fix time.

(*b.*) The Court or judge at the time of giving judgment, or the Court or a judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods hereinbefore prescribed.

Cons. Ord. XXIX. rr. 6, 7.

(*g*) This rule supersedes Cons. Ord. XXIX. rr. 6, 7.
The service of the decree required by Cons. Ord. XXIX. r. 1, is no longer necessary for the purpose of this rule, see *Land Credit of Ireland* v. *Fermoy*, L. R. 5 Ch. 323 ; *Streeten* v. *Whitmore*, 5 Beav. 228.

Form of order for payment of money.

(*h*) In order to issue writs of *fieri facias* or *elegit* (as to which see Ord. XLIII., *infra*), the order must be for payment to a person, not to his account in a bank, *Re Leeds Banking Company*, L. R. 1 Ch. 150.

Naming period for payment.

(*i*) It was held under the old practice that the period named must not be before the day of entering the judgment, *Adkins* v. *Bliss*, 2 De G. & J. 286.

Writ of execution to remain in force one year only unless renewed

16. A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided ; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed, by the party issuing it, for one year

from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof. (15 & 16 Vict. c. 76, s. 124).

Evidence of renewal (15 & 16 Vict. c. 76, s. 125).

17. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

Execution within six years.

18. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment (*k*).

(*k*) See 15 & 16 Vict. c. 76, s. 128.

Leave to issue after six years or after change of parties.

19. Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise, as shall seem just (*l*).

(*l*) See 15 & 16 Vict. c. 76, s. 129.

Enforcement of orders.

20. Every order of the Court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.

Process by or against persons not parties.

21. In cases other than those mentioned in rule 18 any person not being a party in an action, who obtains any

Order XLII. Execution.

order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action (*m*).

(*m*) This is from Cons. Ord. XXIX. r. 2.

Application for stay of execution.

22. No proceeding by audita querela shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or judge may give such relief and upon such terms as may be just.

Saving as to process.

23. Nothing in any of the rules of this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

Issue of several writs.

24. Nothing in this order shall affect the order in which writs of execution may be issued.

Order XLIII.

ORDER XLIII.

Writs of Fieri Facias and Elegit.

Effect and execution of writs of *fi. fa.* and elegit.

1. Writs of fieri facias and of elegit shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed (*a*).

Cons. Ord. XLII. r. 15.

(*a*) See notes to Ord. XLII. r. 15, *ante*, by which these writs may be issued to enforce payment of any sum of money payable under a judgment, and which supersedes Cons. Ord. XXIX. rr. 6, 7, which gave a month from entering the order.

Issuing successive writs.

Where a writ of *fi. fa.* issued into one county has failed to satisfy the demand, another writ may issue into another county (*Spencer* v. *Allen*, 2 Ph. 215; and see *Hodgson* v. *Hodgson*, 23 Beav. 604).

A sequestration was directed after a return of *nulla bona* to a writ of *fi. fa.* (*Westby* v. *Westby*, 5 De G. & Sm. 516).

Cons. Ord. XIX. rr. 8, 10.

Cons. Ord. XXIX. rr. 8, 10, provided as follows for the execution and return of writs of *fieri facias* and *elegit*:—

Order XLIII. Writs.

Cons. Ord. XXIX. Rule 8. By whom and how writs executed.

Such writs when sealed shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior Courts of Common Law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he ought to execute such like writs. And such writs, when returned by such sheriff or other officer, shall be delivered to the parties or solicitor by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the Clerks of Records and Writs. Return, delivery, &c., of writs.

Fees.

*And for the execution of such writs, such sheriff or other officer shall not take or be allowed any fees * other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior Courts of Common Law.*

* See now Ord. XLII. r. 13, *ante*.

Rule 10. Indorsement on writs of *fi. fa.* and *elegit*.

On every such writ of fieri facias *and* elegit *so to be issued as aforesaid, there shall be indorsed, in addition to the particulars required by the 2nd or 5th rule of Order III.,* the words "By the Court," and also thereunder the calling and place of residence of the person against whom such writ shall be issued; and every such writ shall be also indorsed for the sum to be levied, according to the form used upon like writs issuing out of the superior Courts of Common Law.*

* See now Ord. IV. rr. 1, 2, pp. 435, 437, *ante*.

2. Writs of venditioni exponas, distringas nuper vice comitem, fieri facias de bonis ecclesiasticis, sequestrari facias de bonis ecclesiasticis, and all other writs in aid of a writ of fieri facias or of elegit, may be issued and executed in the same cases and in the same manner as heretofore (*b*).

Writs in aid of *fieri facias*.

(*b*) See Cons. Ord. XXIX. rr. 9, 11, 12, 13, which are as follows :—

Cons. Ord. XXIX. r. 9, 11, 12, 13.

Rule 9. Form of writ of *venditioni exponas*.

Where it appears, upon the return of any such writ of fieri facias *as aforesaid, that the sheriff or other officer has by virtue of such writ seized but not sold any goods of the person directed to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable shall, immediately after such writ with*

Order XLIII. Writs.

Cons. Ord. XXIX.

such return shall have been filed as of record, be at liberty to sue out a writ of venditioni exponas *in the form set forth in schedule (H), or as near thereto as the circumstances of the case may require.*

Rule 11. Writs of *fi. fa. de bonis ecclesiasticis,* or *sequestrari facias.*

11. *Where it appears, upon the return of any writ of* fieri facias *or any writ of* elegit *issued in pursuance of the 6th rule of this order, that the person against whom such writ was so issued, is a beneficed clerk, and has* no goods or chattels *nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable, shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out one or more writ or writs of* fieri facias de bonis ecclesiasticis, *or one or more writ or writs of* sequestrari facias, *in the form stated in schedule (J), or as near thereto as the circumstances of the case may allow.*

Rule 12. Indorsement.

12. *On every such writ of* fieri facias de bonis ecclesiasticis *or writ of* sequestrari facias *so to be issued as aforesaid, there shall be indorsed, in addition to the particulars required by the 2nd or 5th rule of Order III, the words "By the Court," and also thereunder the calling (if any) and place of residence (if any) of the person against whom such writ shall be issued; and every such writ shall be also indorsed for the sum to be taken or levied, according to the form used upon like writs issuing out of the superior Courts of Common Law.*

Rule 13. Proceedings thereon.

13. *Such writs, when sealed, shall be delivered to the bishop, and shall be executed by him as nearly as may be in the same manner in which he ought to execute such like writs issuing out of the superior Courts of Common Law. And such writs, when returned by the bishop, shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the Clerks of Records and Writs. And for the execution of such writs, the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for*

the execution of the like writs issuing out of the superior Courts of Common Law. Order XLIII. Writs.

Before a *fieri facias de bonis ecclesiasticis* can issue, it must be shown that the beneficed clerk has *no goods or chattels*, not only that they are insufficient, *Rabbits* v. *Woodward*, W. N. (1868) 152, 199.

ORDER XLIV.

ATTACHMENT.

Order XLIV.

1. A writ of attachment (*a*) shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had. Effect of writ of attachment.

(*a*) See the Debtors Act, p. 294, *ante*, and rules thereunder, p. 298, 299. See note to Ord. XLII. r. 13, as to costs. Debtors Act. Costs.

No date need be specified for the return of the writ by the sheriff, *Owen* v. *Pritchard*, W. N. (1876) 147. Date for return of writ.

2. No writ of attachment shall be issued without the leave of the Court or a judge (*b*), to be applied for on notice to the party against whom the attachment is to be issued. Notice to be given.

(*b*) See *Garling* v. *Royds*, L. R. 1 Ch. Div. 81; *Dallas* v. *Glyn*, 24 W. R. 881, 34 L. T. N. S. 897, W. N. (1876) 214; *Re a solicitor*, L. R. 1 C. D. 445. The old practice was to issue the writ without notice, and the costs were fixed, but the costs are now in the discretion of the Court, *Abud* v. *Riches*, L. R. 2 C. D. 528, 24 W. R. 637; and see Ord. XLII. r. 13, *supra*; and *Hope* v. *Carnegie*, L. R. 4 Ch. 264. New practice as to attachment.

Though husband and wife appear jointly the husband cannot be committed for the wife's separate contempt, where she lives apart from him, *Hope* v. *Carnegie*, L. R. 7 Eq. 254.

The indorsement on the writ expresses the object of it, and a time is limited for the sheriff to make his return, fifteen days, *i.e.*, fifteen days at least, *Wroe* v. *Clayton*, 16 Sim. 183, if the party in contempt resides more than twenty miles from London, see *Zulueta* v. *Vinent*, 15 Beav. 273, otherwise it is now (by 1 Will. 4, c. 36, s. 15, r. 3) returnable immediately. Indorsement. When *returnable* immediately.

As to affidavits in support of attachments, see *Gardner* v. *Rowe*, 4 Russ. 578. Affidavit in support.

The writ is executed by the sheriff of the county into which it issues; but if he cannot find the person named in the writ, he makes the return "*non est inventus*," and the Court will then make an order, upon affidavit by the sheriff of *due diligence*, for a sequestration (see next note); or in cases within Ord. XLII. r. 5, p. 570, *ante*, that the *serjeant-at-arms* arrest such person. Execution and *return* of writ.

The ordinary returns made to the writ are three: (1) That the person cannot be found (see above). (2) That he is in prison (and a sheriff who improperly discharges a person in his custody is liable to be committed, *Kendal* v. *Baron*, 2 Dick. 661); or (3), that the sheriff has taken bail; but where the writ issues for non-compliance with an order of the Court, see p. 570, *ante*, the attachment is not bailable, and when a sheriff improperly returns that he has taken bail, a messenger will be ordered to go, *Cowdray* v. *Cross*, 24 Beav. 445. (1) *Non est inventus.* (2) Imprisonment. (3) Bail. Contempt not bailable.

Order XLV. Attachment of Debts.

ORDER XLV.

Attachment of Debts.

Examination of judgment debtor as to debts due to him.

1. Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the Court or a judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or judge shall appoint; and the Court or judge may make an order for the examination of such judgment debtor, and for the production of any books or documents (*a*).

(*a*) See 17 & 18 Vict. c. 125, s. 60; Chitty's Statutes, III. 781.

Power to make garnishee order.

2. The Court or a judge may, upon the ex parte application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt (*b*).

(*b*) See 17 & 18 Vict. c. 125, s. 61; Chitty's Statutes, III. 781.

Service.

3. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct, shall bind such debts in his hands (*c*).

(*c*) See 17 & 18 Vict. c. 125, s. 62.

Proceedings to levy amount due from garnishee.

4. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor or if he does not appear upon summons, then the Court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt (*d*).

(*d*) See 17 & 18 Vict. c. 125, s. 63.

Order to sue garnishee.

5. If the garnishee disputes his liability, the Court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined (*e*).

(*e*) See 17 & 18 Vict. c. 125, s. 64; Chitty's Statutes, III. 782.

Lien of third party on debt.

6. Whenever in proceedings to obtain attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or judge may order such third person to appear, and state the nature and particulars of his claim upon such debt (*f*).

(*f*) See 23 & 24 Vict. c. 126, s. 29; Chitty's Statutes, III. 793.

May be barred.

7. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and may bar the claim of such third person, or make such other order as such Court or judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such

Order XLV. Attachment of Debts.

third person, and to costs, as the Court or judge shall think just and reasonable (*g*).

(*g*) See 23 & 24 Vict. c. 126, s. 30 ; Chitty's Statutes, III. 793.

Discharge of garnishee.

8. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed (*h*).

(*h*) See 17 & 18 Vict. c. 125, s. 65 ; Chitty's Statutes, III. 782.

Attachment book.

9. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise ; and copies of any entries made therein may be taken by any person upon application to the proper officer (*i*).

(*i*) See 17 & 18 Vict. c. 125, s. 66 ; Chitty's Statutes, III. 782.

Costs.

10. The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a judge (*k*).

(*k*) See 17 & 18 Vict. c. 125, s. 67 ; Chitty's Statutes, III. 783.

Order XLVI.

ORDER XLVI.

Charging of Stock or Shares and Distringas.

Charging order on stock or shares.

1. An order charging stock or shares (*a*) may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1 (*b*).

Debt of infant.

(*a*) A charging order founded on an infant's debt is inoperative, *Re Onslow*, L. R. 20 Eq. 677.

Untaxed costs.

An order was made charging defendant's shares with the costs of suit though untaxed, *Burns* v. *Irving*, W. N. (1876) 188, 34 L. T. N. S. 752.

Order XLVI. Charging Orders.

If the stock or shares are in Court a stop order has to be obtained, and it is no longer necessary, as a preliminary to obtaining a stop order on a fund standing in Court to the credit of the Chancery Division of the High Court of Justice, by a person who has a judgment in an action in another division of the High Court, that he should obtain a charging order in that division, *Hopewell* v. *Barnes*, L. R. 1 C. D. 630, 33 L. T. N. S. 777.

Stop order.

Cons. Ord. XXVI. relates to stop orders, and is as follows:—

Cons. Ord. XXVI.

Rule 1. Costs occasioned by stop orders.

Where any stocks, funds, shares, securities, or monies are standing in the name of the Accountant-General in trust in or to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such stocks, funds, shares, securities, or monies, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such stock, funds, shares, securities, or monies, the person by whom any such order shall be obtained, or the shares of such stocks, funds, shares, securities, or monies affected by such order, shall be liable at the discretion of the Court or the judge at chambers, as the case may be, to pay any costs, charges, and expenses, which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in any such stocks, funds, shares, securities, or monies.

Rule *2. Service of petition for stop order.

Any person presenting a petition or taking out a summons for any such order as aforesaid shall not be required to serve such petition or summons upon the parties to the cause, or upon the persons interested in such parts of the stocks, funds, shares, securities, or monies as are not sought to be affected by any such order.

Mode of obtaining stop orders.

In cases where the assignor consents to a stop order (see *Lister* v. *Tidd*, L. R. 4 Eq. 462, 15 W. R. 917), a stop order should be taken at chambers (*Edmonson* v. *Harrison*, 1 W. R. 140; *Wellesley* v. *Mornington*, W. N. (1871) 220). If the assignor does not concur, the application is made by petition (Seton, 953; but see *Wrench* v. *Wynn*, 17 W. R. 198; as to evidence necessary, see *Wood* v. *Vincent*, 4 Beav. 419; *Quarman* v. *Williams*, 5 Beav. 133).

Evidence.

A stop order gives no priority among charges equal in degree, *Warburton* v. *Hill*, Kay, 470; *Greening* v. *Beckford*, 5 Sim. 195; *Swayne* v. *Swayne*, 11 Beav. 463; *Hulkes* v. *Day*, 10 Sim. 41; *Lister* v. *Tidd*, L. R. 4 Eq. 462; *Ex parte Kent*, 19 W. R. 596; for by granting a stop order the Court decides nothing as to the rights and priorities of contending parties, *Lucas* v. *Peacock*, 9 Beav. 118; *Hawkesley* v. *Gowan*, 12 W. R. 1100; and see *Re Blunt*, 10 W. R. 379. Trustees in bankruptcy who obtained no stop order were postponed to a mortgagee who obtained one after the bankruptcy, *Stuart* v. *Cockerell*, L. R. 8 Eq. 607.

Order XLVI. Charging Orders.

In *Re Duke of Cleveland's Harte estates*, January 17, 1862, V.-C. Kindersley granted a prospective stop order, restraining the payment of funds hereafter to be paid in to a particular account; but refused to make such a prospective order where there was no certainty that any fund would be brought into Court, *Wellesley* v. *Mornington*, 11 W. R. 17. The operation of the order, though general in terms, is confined to the amount on which the order was founded, *Macleod* v. *Buchanan*, 33 Beav. 234.

Prospective order.

Costs of payment out after stop order.

The order for payment out of a fund in Court of the claims of an incumbrancer who has obtained a stop order should include the costs of obtaining the stop order (*Waddilove* v. *Taylor*, 6 Hare, 307), for if it does not do so they will be disallowed (*ibid.*).

Of unnecessary stop order.

A mortgagee who, after notice that the parties entitled to a distributable fund in Court had presented a petition for payment to him and them of the funds, applied for a stop order, was refused his costs of the application (*Hoole* v. *Roberts*, 12 Jur. 108). See, further, as the costs of a stop order and the appearance of persons who have obtained one, *Grimsby* v. *Webster*, 8 W. R. 725; *Edwards* v. *Grove*, 29 L. J. Ch. 839.

Service on the assignor is necessary, though a party to the cause, *Parsons* v. *Groome*, 4 Beav. 521; *Levinger* v. *Crombie*, 21 W. R. 37; *Re Nowell*, 11 W. R. 896; but not on other parties to the cause, *Glazbrook* v. *Gillatt*, 9 Beav. 611.

(*b*) The following are the sections referred to:

1 & 2 Vict. c. 110, s. 14. Charging order.

XIV. "And be it enacted, that if any person against whom any judg-" ment shall have been entered up in any of her Majesty's superior courts " at Westminster shall have any government stock, funds, or annuities, " or any stock or shares of or in any public company in England (whether " incorporated or not), standing in his name in his own right, or in the " name of any person in trust for him, it shall be lawful for a judge of one " of the superior courts, on the application of any judgment creditor, " to order that such stock, funds, annuities, or shares, or such of them or " such part thereof respectively as he shall think fit, shall stand charged " with the payment of the amount for which judgment shall have been so " recovered, and interest thereon, and such order shall entitle the judgment " creditor to all such remedies as he would have been entitled to if such " charge had been made in his favour by the judgment debtor (see *Re* " *Onslow*, 44 L. J. Ch. N. S. 628); provided that no proceedings shall be " taken to have the benefit of such charge until after the expiration of six " calendar months from the date of such order.

No proceedings after six months.

3 & 4 Vict. c. 82, s. 1. Provisions extended to contingent interest and to stock in Court.

" The aforesaid provisions of the said Act shall be deemed and taken to " extend to the interest of any judgment debtor (*i.e.*, 1 & 2 Vict. c. 110, " s. 14), whether in possession, remainder, or reversion, and whether vested " or contingent, as well in any such stocks, funds, annuities, or shares as " aforesaid as also in the dividends, interest, or annual produce of any such " stock, funds, annuities or shares; and whenever any such judgment " debtor shall have any estate, right, title or interest, vested or contingent, " in possession, remainder, or reversion, in, to, or out of any such stocks, " funds, annuities or shares as aforesaid, which now are, or shall hereafter, " be standing in the name of the Accountant-General of the Court of " Chancery,* or the Accountant-General of the Court of Exchequer, or in, " to, or out of the dividends, interest, or annual produce thereof, it shall be " lawful for such judge to make any order as to such stock, funds, annuities, " or shares, or the interest, dividends, or annual produce thereof, in the " same way as if the same had been standing in the name of a trustee of " such judgment debtor: Provided always, that no order of any judge as to " any stock, funds, annuities, or shares standing in the name of the " Accountant-General of the Court of Chancery or the Accountant-" General of the Court of Exchequer, or as to the interest, dividends, or " annual produce thereof, shall prevent the Governor and Company of the " Bank of England, or any public company, from permitting any transfer " of such stocks, funds, annuities, or shares, or payment of the interest, " dividends, or annual produce thereof, in such manner as the Court of " Chancery or the Court of Exchequer respectively may direct, or shall

* See now p. 322, *ante*.

"have any greater effect than if such debtor had charged such stock, funds, "annuities or shares, or the interest, dividends, or annual produce thereof, "in favour of the judgment creditor, with the amount of the sum to be "mentioned in any such order." Order XLVI. Charging Orders.

XV. "And in order to prevent any person against whom judgment shall "have been obtained from transferring, receiving or disposing of any stock, "funds, annuities, or shares hereby authorised to be charged for the benefit "of the judgment creditor under an order of a judge, be it further enacted, "that every order of a judge charging any government stock, funds, or "annuities, or any stock or shares in any public company, under this Act, "shall be made in the first instance *ex parte*, and without any notice to the "judgment debtor, and shall be an order to show cause only; and such "order, if any government stock, funds, or annuities standing in the name "of the judgment debtor in his own right, or in the name of any person in "trust for him, is to be affected by such order, shall restrain the Governor "and Company of the Bank of England from permitting a transfer of such "stock in the meantime and until such order shall be made absolute or dis-"charged; and if any stock or shares of or in any public company, standing "in the name of the judgment debtor in his own right, or in the name of "any person in trust for him, is or are to be affected by any such order, "shall in like manner restrain such public company from permitting a trans-"fer thereof; and that if, after notice of such order to the person or persons "to be restrained thereby, or in case of corporations to any authorised "agent of such corporation, and before the same order shall be discharged "or made absolute, such corporation or person or persons shall permit any "such transfer to be made, then and in such case the corporation or person "or persons so permitting such transfer shall be liable to the judgment "creditor for the value or amount of the property so charged and so trans-"ferred, or such part thereof as may be sufficient to satisfy his judgment; "and that no disposition of the judgment debtor in the meantime shall be "valid or effectual as against the judgment creditor; and further, that, "unless the judgment debtor shall within a time to be mentioned in such "order show to a judge of one of the said superior courts sufficient cause to "the contrary, the said order shall, after proof of notice thereof to the "judgment debtor, his attorney or agent, be made absolute: provided that "any such judge shall, upon the application of the judgment debtor, or "any person interested, have full power to discharge or vary such order, "and to award such costs upon such application as he may think fit." 1 & 2 Vict. c. 110, s. 15. Order of judge to be made in the first instance *ex parte*, and interim restrain of transfer by company, &c.

As to the charging of contingent interests, see *Cragg* v. *Taylor*, L. R. 2 Ex. 131; *Dixon* v. *Wrench*, L. R. 4 Ex. 154. Contingent interests.

It does not follow from sect. 14 of the Act that collateral proceedings may not be instituted before the six months expire, *Bristed* v. *Wilkins*, 3 Hare, 235, 239; *e.g.*, a stop order may be obtained, *Watts* v. *Jefferys*, 3 M. & G. 372. Six months' rule.

When the order is made absolute, the bank or public company, which is bound by the statute to hold its hand during the pendency of the order *nisi* (compare note (*f*), p. 273, *ante*, and *Re Suisse*, 6 Jur. 957), will no longer be bound to take notice of the charge, unless the judgment creditor has instituted an action or taken some other steps (see *Reece* v. *Taylor*, 13 Sim. 480), but must pay the dividends to the persons legally entitled thereto as before the charging order was made, and his receipt will discharge the company (*Churchill* v. *Bank of England*, 11 M. & W. 323; *Bristed* v. *Wilkins*, 3 Hare, 235). Such person will be bound, the order having been made absolute, to give effect to the charge on the stock or shares, and the bank or company is no longer concerned with the questions arising between the judgment creditor and other persons interested. See also note (*c*) to r. 2, *infra*. Effect of interim and absolute order on the company or the bank.

Nothing which has taken place subsequent to the original charging order is a sufficient cause to prevent its being made absolute; therefore where a decree had been made for administration of the debtor's estate subsequently to the order *nisi*, an injunction to restrain the creditor from applying to have the order made absolute was refused (*Haley* v. *Barry*, 3 L. R. Order when to be made absolute.

Order XLVI. Distringas.

Ch. 452 ; *Scott* v. *Lord Hastings*, 1 K. & J. 633) ; but if the debtor had assigned the property before the original charging order was made, the creditor does not by such order obtain even an inchoate right (*Warburton* v. *Hill*, Kay, 470, as explained in *Haley* v. *Barry*, *loc. cit.*), and see *Robinson* v. *Nisbett*, 3 L. R. C. P. 264, overruling *Watts* v. *Porter*, 3 E. & B. 743.

Distringas against bank.

2. Any person claiming to be interested in any stock transferable at the Bank of England standing in the name of any other person may sue out a writ of distringas pursuant to the statute 5 Vict. c. 8,* as heretofore (*c*). Such writ to be issued out of any office of the High Court in London, where writs of summons are issued.

* Lege, c. 5.

Evidence.

(*c*) The application must be supported by evidence that the shares are in danger of being made away with ; for an ordinary creditor cannot apply to restrain transfer of shares till the bills are paid, *Re East of England Bank*, 6 N. R. 81 ; *Ex parte Field*, 1 Y. & C. Ch. 1.

The bank does not look at the affidavit (see *Re Cross*, 10 W. R. 53).

Interim order against the bank.

The effect of a *distringas* is merely an interim injunction against the bank, and when the order is made absolute the bank is relieved from all liability except to the judgment debtor, its customer, unless the judgment creditor has taken other proceedings, see note at foot of p. 585, *supra*, as to this being the effect of charging orders generally; and see *Ex parte Amyot*, 1 Hare, 584, 1 Ph. 203 (*n*) ; *Re Marquis of Hertford*, 1 Ph. 129.

Cons. Ord. XXVII.

Cons. Ord. XXVII. provided as to this writ as follows :

Rule 1. Form of writ of *distringas*.

1. *Any person claiming to be interested in any stock transferable at the bank, standing in the name of any other person or body politic or corporate, in the books of the governor and company of the bank, may, by his solicitor, prepare a writ of* distringas *pursuant to the stat.* 5 *Vict. c.* 5, *in the form set out in the first schedule to the said Act, and may present the same for sealing at the Office of the Clerks of Records and Writs.*

Rule 2. Sealing of writ.

2. *Upon the presentment of such writ for sealing, and on leaving with the Clerks of Records and Writs an affidavit, duly sworn by the person or one of the persons applying for such writ or his solicitor before some person authorised to administer oaths in Chancery, in the form set out at the end of this rule, the same writ shall (in conformity with the* 37*th rule of Order I.**) *be forthwith sealed with the seal of the Office of the Clerks of Records and Writs, and such writ, when sealed, shall have the same force and validity as the writ of* distringas *formerly issued out of the Court of Exchequer.*

* See p. 440.

Force of writ.

Form of Affidavit.

"*A.B.* [*the name of the person or persons in whose behalf the writ is sued out*] v. *The Governor and Company of the Bank of England.*

"*I*, ——, *of* —— *do solemnly swear, that, according to the best of my knowledge, information, and belief, I am* [*or, if the affidavit is made by the solicitor, A. B., of* —— *is*] *beneficially interested in the stock hereinafter particularly described, that is to say*" [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing*].

Rule 3. Discharge of writ.

3. *Such writ of* distringas, *and all process thereunder, may at any time be discharged by an order to be obtained as of course upon the petition of the person on whose behalf the writ was issued, or to be obtained upon the application, by motion on notice or by petition duly served, of any other person claiming to be interested in the stock sought to be affected by such writ. And upon or after such application, such costs thereof and in relation thereto and to the said writ as to the Court shall seem just, may, if the Court shall think fit, be awarded, and ordered to be paid by the person on whose behalf the writ was issued, or, upon an application by any other person, by such person.*

Rule 4. Bank not to be authorised to refuse transfer, or withhold payment of dividends for eight days after request to transfer, &c.

4. *Where the Governor and Company of the Bank, after having been served with such writ of* distringas, *and a notice not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, receive a request from the person in whose name such stock is standing, or some person on his behalf or representing him, to allow such transfer, or to pay such dividends, the said Governor and Company shall not, by force or in consequence of such* distringas, *be authorised, without the order of the Court, to refuse to permit such transfer to be made or to withhold payment of such dividends for more than eight days after the date of such request.*

Order XLVII. Sequestration.

ORDER XLVII.

Writ of Sequestration.

Sequestration against estates and effects.

Where any person is by any judgment directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall at the expiration of the time limited for the performance thereof, be entitled without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery (*a*).

Process under Debtors Act.

Priority over mortgage.

Order for sale.

Property liable to sequestration.

(*a*) See Rules under the Debtors Act, r. 3, p. 297, *ante*, as to enforcing decrees and orders by sequestration, abrogating Cons. Ord. XXIX. rr. 3, 4.

As to the priority of a sequestration over a mortgage, see *Ward* v. *Booth*, L. R. 14 Eq. 195; an order for sale ought to be obtained in chambers, *Turner* v. *Clifford*, W. N. (1870) 199.

As to taking a married woman's annuity under a sequestration, see *Claydon* v. *Finch*, L. R. 15 Eq. 266.

In *Conn* v. *Garland*, L. R. 9 Ch. 101, a deposit on appeal was paid to the sequestrator.

Order XLVIII.

ORDER XLVIII.

Writ of Possession.

Judgment for possession of land.

1. A judgment that a party do recover possession of any land may be inforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.

Writ of possession.

2. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment and that the same has not been obeyed (*a*).

(*a*) See Cons. Ord. XXIX. r. 5., by which—

Order XLVIII. Writ of possession.

Upon due service of a decree or order for delivery of possession, the person prosecuting the same shall be entitled to an order for a writ of assistance.

Cons. Ord. XXIX. r. 5.

Writ of assistance.

An affidavit in support of an application for this writ need not show an *existing* non-compliance with the order to be enforced (*Webster* v. *Taylor*, 18 Jur. 869).

Evidence and form of writ.

A writ of assistance will be granted though the indorsement on the decree only states that the party disobeying it will be liable to attachment, serjeants-at-arms, or sequestration (*Bower* v. *Cooper*, 2 Hare, 412 ; but see *Hinde* v. *Blake*, 12 L. J. Ch. 56). A writ of assistance will not be granted to a receiver in distraining for rent (*White* v. *Phibbs*, Sausse & Scully, 88).

Writ when granted.

ORDER XLIX.

Order XLIX.

Writ of Delivery.

A writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

ORDER L.

Order L.

Change of Parties by Death, &c.

1. An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue (*a*), and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite.

Actions not to abate by marriage, death, or bankruptcy, or become defective by devolution of estate.

(*a*) The liability for a tort is not a cause of action which continues against the trustees of a composition deed of the wrongdoer, *Bovill* v. *Goodier*, W. N. (1868) 35.

Liability for tort.

2. In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order (*b*) that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as

Order to continue action.

Order L. Change of parties by death.

the Court or judge shall think just, and shall make such order for the disposal of the action as may be just.

(*b*) The order should be obtained at the Rolls by petition of course or in chambers, see *Walker* v. *Blackmore*, W. N. (1876) 132.

The rule was extended to the case of petition, *Re Atkins*, L. R. 1 Ch. Div. 82.

As to actions commenced before the Act, see *Darcy* v. *Whittaker*, 24 W. R. 244; *Scruby* v. *Payne*, 24 L. T. N. S. 845.

In case of devolution of title.

3. In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

Where interest is transmitted or new person comes into existence.

4. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, and such new party or parties, may be obtained ex parte on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence (*c*).

(*c*) Such order should be obtained at the Order of Course Office, *Roffey* v. *Miller*, 24 W. R. 109, W. N. (1875) 225; *Darcy* v. *Whittaker*, 33 L. T. N. S. 178, W. N. (1876) 17; *Walker* v. *Blackmore*, W. N. (1876) 112; cf., too, *Crane* v. *Loftus*, 24 W. R. 93.

Service of order to continue action.

5. An order so obtained shall, unless the Court or judge shall otherwise direct, be served upon the continuing party or parties to the action, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the action shall be bound to enter an appearance thereto within the same time and in the

same manner as if he had been served with a writ of summons. Order L. Change of parties by death.

6. Where any person who is under no disability or under no disability other than coverture, or being under any disability other than coverture, but having a guardian ad litem in the action, shall be served with such order, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the service thereof. Application to discharge order

7. Where any person being under any disability other than coverture, and not having had a guardian ad litem appointed in the action, is served with any such order, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians ad litem for such party, and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned person. In case of disability.

ORDER LI. Order LI.

Transfers and Consolidation.

1. Any action or actions (*a*) may be transferred from one division to another of the High Court or from one judge to another of the Chancery Division (*b*), by an order of the Lord Chancellor (*c*), provided that no transfer shall be made from or to any division without the consent of the president of the division. Transfer of actions.

(*a*) The rule applies to petitions, *Re Boyd*, L. R. 1 C. D. 12. Petitions.

(*b*) As to transfers from one judge to another, see *Duffort* v. *Arrowsmith*, 7 D. M. G. 434; *Ladbrooke* v. *Bleadon*, 15 Beav. 475; *Scott* v. *Stone*, 22 L. J. Ch. 911; *Re Hulley*, L. R. 1 C. D. 11; *Re Boyd*, *ibid.* 12.

See note (*c*) (p. 445) to Ord. V. r. 4, as to transfer where there are two actions for the same subject-matter, and *Smith* v. *Whichcord*, 24 W. R. 900, where there were three.

(*c*) Application to the secretary of the Lord Chancellor is sufficient if accompanied by the written consent of all parties. If all parties do not consent, the application must be made in Court (Memorandum, L. R. 1 Ch. Div. 141), not to the Court of Appeal as formerly, see *Re Hutley*, L. R. 1 C. D. 11, 33 L. T. N. S. 337, 45 L. J. Ch. Div. 79; *Re Boyd*, L. R. 1 C. P. 12. How transfer applied for.

If the parties neglect to apply the judge will, on his attention being

Order LI. Transfers.

called to the propriety of a transfer, apply to the Lord Chancellor himself, *Swale* v. *Swale*, 22 Beav. 401.

Notice of application.

One clear day's notice should be given to the other parties to the suit by the party desiring to transfer, *Sidebottom* v. *Sidebottom*, 7 W. R. 104; *Bond* v. *Barnes*, 2 D. F. J. 387; *Humphreys* v. *Edwards*, 45 L. J. Ch. Div. 112.

Refusal on insufficient grounds to consent may be visited with costs, *Cocq* v. *Hunasgeria Coffee Company*, 4 L. R. Ch. 415; see *Lyall* v. *Weldhen*, L. R. 9 Ch. 287.

Retransfer of actions.

Where an action has been transferred by general order from one Court to another, a retransfer will not, without consent, be ordered where it will delay the hearing. Where it will not cause delay, the Court will give weight to the fact that the judge from whom it has been transferred has by means of interlocutory applications gained an acquaintance with the facts, *Platt* v. *Walter*, 1 L. R. Ch. 471; but it will not take into consideration that such judge has decided a similar point in another case, *Wilson* v. *Gray*, 14 W. R. 783.

Before an application for retransfer is made, notice must be given to the other side, *Dennis* v. *Morris*, 21 W. R. 43.

A retransfer of a cause was asked for on the ground that queen's counsel had advised in the cause before transfer and briefs had been delivered two months, but it was held that the reasons were not sufficient, *Tiffin* v. *Parker*, 12 W. R. 698.

Transfer at any stage by judge.

2. Any action may, at any stage, be transferred from one division to another by an order made by the Court or any judge of the division to which the action is assigned (*d*): Provided that no such transfer shall be made without the consent of the president of the division to which the action is proposed to be transferred.

In case of winding-up.

2A. When an order has been made by any judge of the Chancery Division for the winding-up of any company under the Companies Acts, 1862 and 1869, or for the administration of the assets of any testator or intestate, the judge in whose Court such winding-up or administration shall be pending shall have power, without any further consent, to order the transfer to such judge of any action pending in any other division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be.

Actions transferred from Chancery Division.

(*d*) The latter part of this rule, marked 2A, was added by r. 18 of the Rules of June, 1876.

In *Humphreys* v. *Edwards*, 45 L. J. Ch. Div. 112, an action for salvage was directed to be transferred to the Admiralty Division; but an application to transfer an action for damages to the Queen's Bench Division was refused, *Cannot* v. *Morgan*, L. R. 1 Ch. Div. 1, 45 L. J. Ch. Div. 50; though the costs in a previous action were yet unpaid (*ibid.*).

Where in an action for the possession of land a counterclaim for the specific performance of an agreement for a lease is made, the action ought to be transferred to the Chancery Division on a *primâ facie* case for specific performance being made out, *Hillman* v. *Mayhew*, L. R. 1 Ex. D. 132, 45

L. J. Ex. 334, 34 L. T. N. S. 256, from which it would seem that the order may be made by a judge sitting in chambers.
See as to giving notice of the application notes to r. 1, *supra*.

Order LI. Transfer of actions.

3. Any action transferred to the Chancery Division or the Probate Division, shall, by the order directing the transfer, be directed to be assigned to one of the judges of such division to be named in the order.

Transfer to Chancery judge.

4. Actions in any division or divisions may be consolidated by order of the Court or a judge in the manner heretofore in use in the Superior Courts of Common Law (*e*).

Consolidation of actions.

(*e*) *I.e.*, representative actions may be tried, or actions arising out of the same series of transactions may be tried together, see *Smith* v. *Whichcord*, 24 W. R. 900; and note to Ord. V., p. 446, *ante*.
Thus, where two suits were instituted for administration the Court stayed proceedings in the second suit, although it prayed additional relief, on the defendant in the first suit undertaking not to offer opposition to any matters not covered by the original decree which the judge in chambers might think fit to add thereto (*Gwyer* v. *Peterson*, 26 Beav. 83; *Matthews* v. *Palmer*, 11 W. R. 610); and in another case, instead of staying proceedings in the second suit, the Court ordered the two suits to be consolidated, and the inquiries directed by the first decree to be extended, *Hoskins* v. *Campbell*, 2 H. & M. 43. See *Zambaco* v. *Cassavetti*, *ubi sup.*; *Macrae* v. *Smith*, 2 K. & J. 411; *Lankester* v. *Wood*, 14 L. T. N. S. 512.
In another case the Court stayed proceedings in the second suit only so far as the first suit gave identical relief, *Dryden* v. *Foster*, 6 Beav. 146. Compare *Piffard* v. *Vanrenen*, 13 W. R. 425; and for a case of consolidation of a large number of suits, see *Foxwell* v. *Webster*, 2 Dr. & Sm. 257, note, 12 W. R. 186; and see note to r. 1, *ante*.

ORDER LII.

Order LII.

Interlocutory Orders as to Mandamus, Injunctions, or Interim Preservation of Property, &c.

1. When by any contract a primâ facie case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured (*a*).

Interim preservation or custody.

(*a*) This rule does not enable a mere creditor to restrain a debtor from dealing with his property (see *National Provincial Bank* v. *Thomas*, M. R., July 7, 1876, where Jessel, M.R., refused, on the application of the holder

Not by mere creditor.

Order LII. Interlocutory orders.

of a promissory note made by a married woman to restrain her from dealing with her separate estate. Compare note (*c*) to Ord. XLVI. r. 2. As to appointing a receiver to preserve property in litigation, see r. 4, *infra*, and *Hyde* v. *Warden*, L. R. 1 Ex. Div. 309.

Receiver.

Perishable goods.

2. It shall be lawful for the Court or a judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

Preservation or inspection of property.

3. It shall be lawful for the Court or a judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property (*b*), being the subject of such action, and for all or any of the purposes aforesaid to authorise any person or persons to enter upon or into any land or building (*c*) in the possession of any party to such action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

Orders for inspection.

(*b*) An *ex parte* application under this rule was refused in *Habershon and another* v. *Gill*, W. N. (1875) 231, 20 Sol. Jur. 98, 202; but see note (*d*), *infra*.

For an order for inspection of mines, see *Cooper* v. *Ince Hall Company*, W. N. (1876) 24, 20 Sol. Jour. 141.

See for other cases under the rule, *Nicholas* v. *Dracachio*, 24 W. R. 461; *Melhuish* v. *Milton*, 24 W. R. 609; *Power* v. *Lloyd*, *ibid.*, 703.

(*c*) See *Gibbs* v. *David*, 44 L. J. Ch. N. S. 770; following *Boehm* v. *Wood*, 2 J. & W. 236; and as to receivers see note (*d*), *infra*.

Application *ex parte* for injunction or receiver, or interim order, &c.

4. An application for an order under section 25, sub-section 8, of the Act,* or under rules 2 or 3 of this order,† may be made to the Court or a judge by any party. If the application be by the plaintiff for an order under the said sub-section 8,* it may be made either ex parte or with notice, and if for an order under the said rules 2 or 3 of this order† it may be made after notice to the defendant at any time after the issue of the writ of summons,

* For mandamus, injunction, or receiver, p. 345, *ante*.

† For sale, inspection, &c.

and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application (*d*). Order LII., Interlocutory orders.

(*d*) See as to receiver's account, Cons. Ord. XXXV. r. 4, p. 146, *ante*, and 16th Reg. Regul. and notes, pp. 168—170, *ante*.

Interim receiver without security.

The Court of Appeal appointed a plaintiff (who was appealing from a decision involving a lease of his own property), receiver, and manager without security (*Hyde* v. *Warden*, L. R. 1 Ex. Div. 309); and in another case a plaintiff was appointed interim receiver for 14 days without security (*Taylor* v. *Eckersley*, L. R. 2 Ch. Div. 302).

Receiver when appointed.

Where an infant was interested, a receiver was appointed on petition (*Re Leeming*, 20 L. J. Ch. 550, and see *Re Baron*, cited in Seton, 705; where a receiver was appointed on summons in chambers), and if the parties consent, or the application is to supply the *vacant place of a receiver* already appointed, it may be made *in chambers*. No appeal to the Court above lies from the appointment of a receiver by a judge in chambers (*Ley* v. *Ley*, 27 L. T. 267).

Application in chambers.

Injunction or receiver *ex parte* and before writ.

An injunction or receiver may be granted under very special circumstances, even before writ issued, *H.* v. *H.*, L. R. 1 Ch. Div. 276.

A receiver will in a proper case be granted before answer (*Duckworth* v. *Trafford*, 18 Ves. 283; *Aberdeen* v. *Chitty*, 3 Y. & Coll. Exch. Ca. 379).

An interim receiver was appointed before defendant's appearance (*Taylor* v. *Eckersley*, L. R. 2 Ch. Div. 302; *Meaden* v. *Sealey*, 6 Hare, 620; *Hart* v. *Tulk*, *ibid.*, 611; and *Tanfield* v. *Irvine*, 2 Russ. 149).

The appointment was made on an *ex parte* motion in *Taylor* v. *Eckersley*, *ubi sup.*; and see *Dowling* v. *Hudson*, 14 Beav. 423, in a note to which all the cases will be found collected. But when the defendant had not absconded, it was held that the motion could not be made *ex parte* (*Caillard* v. *Caillard*, 25 Beav. 512).

Application by defendant.

For example of an application by a defendant under this rule, see *Sargant* v. *Read*, L. R. 1 C. D. 600.

Manager of a company.

Jessel, M.R., made an interlocutory order for the appointment of a receiver and manager of an iron company on the application of a debenture holder in an action for foreclosure (*Peek* v. *Trinsmaran Iron Company*, L. R. 2 C. D. 115; and see *Taylor* v. *Eckersley*, L. R. 2 C. D. 302).

Indorsement of writ.

A plaintiff should endorse his writ with a claim for an injunction or receiver when the obtaining of either is a substantial object of his action, *Colebourne* v. *Colebourne*, L. R. 1 C. D. 690.

Who may be appointed receiver.

A party to the suit has been appointed receiver (*Davis* v. *Barrett*, 13 L. J. Ch. 304; *Taylor* v. *Eckersley*, L. R. 2 Ch. Div. 302). But he must act without salary, except by express order and by consent (see *Powys* v. *Blagrove*, 18 Jur. 462; *Hoffman* v. *Duncan*, *ibid.*, 69; *Baylies* v. *Baylies*, 1 Coll. 548). A practising barrister may be appointed (*Garland* v. *Garland*, 2 Ves. Jun. 137); but not the solicitor in the cause (*ibid.*), nor the solicitor under a commission of lunacy (*Ex parte Pincke*, 2 Meriv. 452), nor the next friend of infant plaintiffs (*Stone* v. *Wishart*, 2 Madd. 64), nor a trustee (*Anon*, 3 Ves. 515; *Anon* v. *Jolland*, 8 Ves. 72); except in a special case, and without salary (*Sutton* v. *Jones*, 15 Ves. 584; *Sykes* v. *Hastings*, 11 Ves. 363; and see *Banks* v. *Banks*, 14 Jur. 659). A peer will not generally be appointed (*Attorney-General* v. *Gee*, 2 V. & B. 208).

Appointment a matter of discretion.

The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree, *Owen* v. *Homan*, 3 M. & G. 378.

Receiver of property of deceased persons.

As to the mode of applying for a receiver to protect the property of a deceased person, until a legal personal representative can be appointed, see *Overington* v. *Ward*, 34 Beav. 175, and cases there cited.

As to the powers of a receiver generally, see *De Winton* v. *Mayor*, &c., *of Brecon*, 26 Beav. 533; and for the powers of receivers of railway and other companies, see *Gardner* v. *London, Chatham, and Dover Railway Com-*

Powers of receivers.

Order LII. Interlocutory orders.

pany, L. R. 2 Ch. 223; but see as to railway companies 30 & 31 Vict. c. 127, s. 4, p. 273, *ante*.

A receiver may, on its being ascertained to be for the benefit of the estate, be entitled to an allowance for money laid out on the estate without previous order (*Tempest* v. *Ord*, 2 Meriv. 55; *Blunt* v. *Clitherow*, 6 Ves. 799; but see *Attorney-General* v. *Vigor*, 11 Ves. 563); and see as to receivers' allowances, note (*j*), p. 169, *ante*.

Allowances for money expended.

Duty to defend action.

The direction that a receiver shall manage as well as sell and let the estate, authorises him to bring in proposals for ordinary repairs of the buildings on the estate (*Thornhill* v. *Thornhill*, 14 Sim. 600; and see as to the costs, where a receiver, without the express sanction of the Court, defends an action, *Swaby* v. *Dickon*, 5 Sim. 629; *Bristowe* v. *Needham*, 2 Ph. 190; and cf. *De Winton* v. *Mayor of Brecon*, 6 Jur. N. S. 1046).

Receiver appointed for benefit of all parties.

A receiver is appointed for the benefit of all parties (*Faulkner* v. *Daniel*, 3 Hare, 204); and he will not be discharged merely on the application of the party on whose application he was appointed (*ibid.*, *Largan* v. *Bowen*, 1 Sch. & Lef. 296; *Davis* v. *Duke of Marlborough*, 2 Sw. 108); and, on the other hand, all parties are bound by his possession (*Neate* v. *Pink*, 3 M. & G. 476); and if any loss arises from his default the estate must bear it (*Hutchinson* v. *Massarene*, 2 Ball & B. 55). But where the rights of any party to the property have been established, the receiver is to be treated as his receiver (*Boehm* v. *Wood*, T. & R. 345).

Possession of receiver not disturbed without leave of Court.

The possession of the receiver cannot be disturbed without the leave of the Court, even when he is appointed without prejudice to the rights of persons having prior estates, and when the right to take possession is clear (see *Randfield* v. *Randfield*, 1 Drew. & Sm. 310; *Lane* v. *Sterne*, 3 Giff. 629). But the receiver is not in possession until his recognizances are completed, see *Defries* v. *Creed*, 6 N. R. 17.

Application for interim custody.

5. An application for an order under rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a judge.

Delivery of property on payment of charge thereon.

6. Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a judge may at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it.

ORDER LIII.

MOTIONS AND OTHER APPLICATIONS.

Order LIII. Motions and other applications.

1. Where by these rules any application is authorised to be made to the Court or a judge (*a*) in an action, such application, if made to a Divisional Court or to a judge in Court, shall be made by motion (*b*).

Application by motions.

(*a*) Compare Cons. Ord. XXXIII. r. 1, which is as follows :—

Cons. Ord. XXXIII. r. 1. Name of judge.

Every notice of motion intended to be made before any judge shall express that the same is intended to be made before that judge.

(*b*) The evidence on motion or petition may be given by affidavit, Ord. XXXVII. r. 2, p. 551, *ante*.

Evidence on motions.

In disposing of the costs of a motion in a cause, the Court is generally guided by the following rules, laid down in 1823 by V.-C. Sir John Leach, 1 Sim. & St. 357 :—

Costs of motions :

1. That the party making a *successful motion* is entitled to his costs, as costs in the cause, see *Mounsey* v. *Earl Lonsdale*, L. R. 10 Eq. 557, 6 Ch. 141, but the party opposing it is not entitled to his costs as costs in the cause. [This rule does not apply where the motion is occasioned by the default of the moving party, see Morgan & Davey, 34, or where he is seeking an indulgence, *e.g.*, to stay proceedings pending an appeal.]

General rules.

2. That the party making a *motion which fails* is not entitled to his costs, as costs in the cause ; but the party opposing it is entitled to his costs, as costs in the cause. See *Corcoran* v. *Witt*, L. R. 13 Eq. 53.

That where a motion is made by one party, and *not opposed* by the other, the costs of both parties are costs in the cause. [This rule does not apply where the motion is rendered necessary by the other party's default, Morgan & Davey, 35, *e.g.*, on motions to dismiss for want of prosecution, or to commit for contempt or to discharge an irregular order.]

The above rules are now followed when the order is silent as to costs ; but there are exceptions : *e.g.*, where a motion for an injunction to stay the infringement of a patent was ordered to *stand over* until after the trial of an action nothing being said as to costs, and the plaintiff failed in establishing the validity of the patent, it was held, on the bill being dismissed with costs, that the defendant's costs of the motion were costs in the cause, *Betts* v. *Clifford*, 1 J. & H. 74.

Where no order is made as to costs.

The costs of an interlocutory motion which rests upon affidavits which may be displaced by evidence in the cause, will, as a general rule, *be reserved till the hearing* (*Waring* v. *Manchester, Sheffield, and Lancashire Railway Company*, 14 Jur. 613—616. See *Jones* v. *Batten*, 10 Hare. App. xi.). And if the costs of a motion are reserved till the hearing, care should be taken to ask for them at that time, as a general reservation of the costs of the suit until further directions will not include the costs of the motion (per. V.-C. Shadwell in *Gardner* v. *Marshall*, 14 Sim. 588 ; see Morgan & Davey, 33, 34). And it is a useful precaution to ask that the costs may be reserved, not simply until the hearing, but until the hearing *or further* order ; otherwise they could not be obtained if the bill were dismissed before the cause came to a hearing, *Rumbold* v. *Forteath*, 4 Jur. N. S. 608.

Where *costs of suit are* reserved till hearing.

" [t is the common course that where a party asks for something he is entitled to, and also for something that he is not entitled to, he pays the

Costs of motions.

Order LIII. Motions and other applications.

costs of the motion though he succeeds" (per Lord Langdale in *Lancashire* v. *Lancashire*, 9 Beav. 130; and see *Sturch* v. *Young*, 5 Beav. 557).

Costs may be given though not asked for by the notice of motion (*Clarke* v. *Jacques*, 11 Beav. 623; *Butler* v. *Gardiner*, 12 Beav. 525; *Dawson* v. *Jay*, 2 W. R. 598), but *semble*, not if the respondent does not appear (see *Pratt* v. *Walker*, 19 Beav. 281).

Costs not asked for by motion.

Costs given to parties *served* though not interested.

Parties served with notice of motion, though not interested, will, as a general rule, be entitled to their costs of appearance (*Heneage* v. *Aikin*, 1 J. & W. 377; *Bamford* v. *Watts*, 2 Beav. 202; *Major* v. *Major*, 13 Jur. 1, corrected *ibid.*, 202). See *Shaw* v. *Forest*, 20 Beav. 249, where a person who had notice by letter of a motion, though not served, was allowed his costs.

Cons. Ord. XL. r. 23.

It is provided by Cons. Ord. XL. r. 23, as to the costs of an abandoned motion as follows:—

Costs of abandoned motion.

Where a party gives a notice of motion and does not move *accordingly, he shall pay to the other side*, costs to be taxed *by the taxing-master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs.*

This rule was acted upon under the new practice, *Berry* v. *Exchange Trading Company*, L. R. 1 Q. B. Div. 11, 45 L. J. Q. B. Div. 224.

What is an abandoned motion

A motion is abandoned—

(*a*) If the plaintiff *amends*, and gives a new notice of motion, *Eccles* v. *Liverpool Borough Bank*, Johns. 402; *London and Blackwall Railway Company* v. *Limehouse Board of Works*, 3 K. & J. 123; *Smith* v. *Dixon*, 12 W. R. 934.

(*β*) If counsel is not instructed to move on the seal day mentioned in the notice (*Re Compton Smith*, 23 Beav. 284, and see *Wedderburne* v. *Llewellyn*, 13 W. R. 939); and a motion before the Appeal Court will be treated as abandoned if not made when called upon (*Turner* v. *Turner*, 15 Jur. 1165). Where the motion is renewed it will not be heard till the costs of the abandoned motion have been paid (*Bellchamber* v. *Giani*, 3 Madd. 450; and see *Oldfield* v. *Cobbett*, 12 Beav. 91, and note to 23 Beav. 550, *ibid.*).

Representatives reviving and not moving.

When the party giving the notice of motion dies before it is brought on, and his executors decline to proceed with the motion, the other side is not entitled to the costs of the motion, as costs of the abandoned motion or as costs in the cause (*Lewis* v. *Armstrong*, 3 M. & K. 69; *Warner* v. *Armstrong*, 4 Sim. 140).

How and when costs under rule to be applied for.

If a party applies for the costs under this rule he must mention the abandoned notice of motion to the Court, and produce it to the registrar before the order is drawn up (*Withey* v. *Haigh*, 3 Madd. 437).

It is too late to ask for the costs of an abandoned motion at the hearing, at least on speaking to minutes (*Eccles* v. *Liverpool Borough Bank*, Johns. 402; and see *Woodcock* v. *Oxford, Worcester, and Wolverhampton Railway Company*, 17 Jur. 33, where it was held that such costs were to be applied for *on the seal day after the day on which the notice of motion was given.* See, too, *Farquharson* v. *Pitcher*, 4 Russ. 510, where it was held that after a cause has been dismissed for want of prosecution, the plaintiff cannot obtain the costs of an abandoned motion).

Cons. Ord. XL. r. 37.

Cons. Ord. XL. r. 37 provides (but see Ord. LV. r. 1, p. 603, *infra*, as to the Court's discretion generally) as follows:—

Costs upon interlocutory applications.

Upon interlocutory applications, where the Court deems it proper to award costs to either party, the Court may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid.

Order LIII. Motions and other applications.

The Court would not act under this rule "unless the parties were poor, and anxious to put an end to the matter" (per V.-C. Wood in *The London and Blackwall Railway Company* v. *The Board of Works for the Limehouse District*, 26 L. J. Ch. 70).

When parties are poor.

Motions not to be that other side show cause.

2. No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorised by these rules (*c*).

(*c*) See Ord. XL. r. 6, p. 559, *ante*.

Notice of motion to be given,

unless otherwise ordered.

3. Except where by the practice existing at the time of the passing of the said Act any order or rule has heretofore been made *ex parte* (*d*) absolute in the first instance, and except where by these rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby (*e*). But the Court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* (*f*) upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside.

(*d*) Motions granted as of course should be served as soon as possible, *Church* v. *Marsh*, 2 Hare, 632.

Notice to absconding defendant (Ord. XIX. r. 6).

(*e*) If a defendant is absconding, notice may be given by leaving it in the Record and Writ Office, under Ord. XIX. r. 6, p. 490, *ante*, see *Dymond* v. *Croft*, 24 W. R. 700, *Morton* v. *Miller*, *ibid.* 223. Hall, V.-C., suggested that notice of motion for judgment might be included in notice of the writ (see r. 8, *infra*, *Cook* v. *Dey*, W. N. (1876) 122).

Defaulting defendant (Ord. XXIX. r. 10).

If a defendant has appeared and made default in pleading, the motion may be set down under Ord. XXIX. r. 10, p. 511, *ante*.

(*f*) See as to motions for receivers and injunctions *ex parte*, note (*d*), p. 595, *ante*.

Two days' notice.

4. (*g*) Unless the Court or judge give special leave (*h*) to the contrary there must be at least two clear days (*i*) between the service of a notice of motion (*k*) and the day named in the notice for hearing the motion.

Cons. Ord XXXIII. r. 2.

(*g*) This rule is from Cons. Ord. XXXIII. r. 2, which is in the same words.

Leave must be stated.

(*h*) The leave, which may be obtained on *ex parte* motion, must be stated in the notice of motion (*Hill* v. *Rimell*, 2 M. & Cr. 641).

The respondent should not appear if the notice is invalid, *Daubney* v. *Shuttleworth*, L. R. 1 Ex. Div. 53.

As to parties failing to move within the time, see *Berry* v. *Exchange Trading Co.*, L. R. 1 Q. B. D. 77.

Order LIII. Motions and other applications.

As to short notice of motion, see *Hart* v. *Tulk*, 6 Hare 611.

(*i*) See Ord. LVII. as to time.

(*k*) This includes a motion for judgment, which, however, goes into the general paper (see note (*b*), p. 558, *ante*), but see as to motions for judgment, where the defendant makes default in pleading, note (*b*) to Ord. XXIX. r. 10, p. 511, *ante*.

Notice of motion for judgment.

Service of motions or other applications.

5. If on the hearing of a motion or other application (*l*) the Court or judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or judge may think fit to impose.

Cons. Ord. XXXIV. r. 1.

(*l*) See as to service of petitions Cons. Ord. XXXIV. r. 1, which is as follows: —

Statement of persons to be served with petitions.

At the foot of every petition (not being a petition of course) presented to the Lord Chancellor or the Master of the Rolls, and of every copy thereof, a statement shall be made of the persons, if any, intended to be served therewith; and if no person is intended to be served with such petition, a statement to that effect shall be made at the foot of the petition, and of every copy thereof.

Time for service.

The time for service of petitions is at least two days before the day named for hearing by Cons. Ord. XXXIV. r. 2, which is in the same words as Cons. Ord. XXXIII. r. 2, see note (*g*) to r. 4, *supra*.

Service of petition.

All persons interested should be served with notice of a petition. Thus a petition for payment out to the assignee of a fund standing in the name of the assignor, not specifically assigned, must be served on the assignor, though the amount assigned exceeds the fund in court (*Briant* v. *Dennett*, 4 Drew. 550). *Secus*, if there has been an *absolute* assignment of the precise fund (*ibid.*), and see as to serving former trustees with a petition for payment out of a fund, *Donelan* v. *Johnson*, 2 W. N. (1867) 238.

Costs on Petitions.

Costs of appearance of persons having no interest.

Whether allowed to respondents *served*, and appearing.

Whether a party *served*, but *having no interest*, or having an interest, but *not entitled to appear* (*e.g.*, a receiver, *Herman* v. *Dunbar*, 23 Beav. 312), if he appears, will be allowed his costs of appearance, seems to depend on circumstances. (1) If the petition be presented *in a cause*, they will, as a general rule, be *disallowed* (*Garey* v. *Whittingham*, T. & R. 405; *Day* v. *Croft*, 19 Beav. 518; *Wood* v. *Baker*, W. N. (1870) 233; but see *Clark* v. *Simpson*, L. R. 6 Eq. 336; *Rowley* v. *Adams*, 16 Beav. 352); but (2) if it is presented *in a matter*, so that the party served has to consult a solicitor in order to see whether it is necessary for him to appear or not (*Ex parte Queen's College*, 6 W. R. 9; *Ex parte Stevens*, 2 Ph. 772; *Re Third Burnt Tree Building Society*, 12 Jur. 595); the practice is to tender 42 shillings costs, see p. 53, *ante*, and Add. Rules as to costs, Ord. VII. r. 17, *post*; but no costs will be allowed if there is no possibility of interest, see *ibid.*, Ord. VII. r. 21, *post*, and *Re Birch's Legacy*, 2 K. & J. 369; *Re Justices of Coventry*, 19 Beav. 158; *Barton* v. *Latour*, 18 Beav. 536; *Noble* v. *Stow*, 30 Beav. 273, where purchasers who had paid the purchase-money into Court, and got their conveyances, appearing on petitions for payment out of the purchase-money, were refused their costs; see too, *ex parte Ecclesiastical Commissioners*, W. N. (1870) 218; and where a person makes a groundless

claim on the strength of which he is served, but which he afterwards withdraws, his costs of appearance will not be allowed (*Re Parry*, 12 Jur. 615; *Re Shrewsbury School*, 1 M. & G. 85). But costs may be given to a person entitled to appear, who unsuccessfully opposes a petition (*Ex parte Stevens*, 2 Ph. 772).

Costs not allowed to respondents *not* served.

Where, however, a party, even though he be a trustee, appears on a petition *without being served*, he will not be allowed his costs (*Bennett* v. *Biddles*, 20 Jur. 534; *Ex parte Dean of Christ Church*, 9 W. R. 474); see, however, *Shaw* v. *Forest*, 20 Beav. 249, where a person having notice by letter and appearing was allowed his costs.

See further as to service where the petition is for payment of monies out of court, note (*g*) on the 2nd sect. of the Trustee Relief Act, p. 72, *ante*; note (*k*), to the 80th sect. of the Lands Clauses Act, p. 53, *ante*; and as to service under the Trustee Acts, see note (*l*), p. 109.

Foot note.

When the foot note stated that it was intended to serve persons, when it became in fact unnecessary to serve, V.-C. Kindersley allowed the order on the petition to be drawn up without service on those persons (*Davies* v. *Combermere*, 1st May, 1860, and see *Re Green's Trusts*, 8 W. R. 403).

In another case V.-C. Stuart allowed the petition to be amended by striking out the note of intended service altogether (*Re Tweedy*, 9 W. R. 398).

Adjournment.

6. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or judge shall think fit.

Notice to persons served but not appearing.

7. The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

Service of notice of motion with writ.

8. The plaintiff may, by leave of the Court or a judge, to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant (*m*).

(*m*) See *Cook* v. *Dey*, cited note (*e*), *ante*, p. 599.

ORDER LIV.

Applications at Chambers.

Application at chambers.

1. Every application at chambers (*a*) authorised by these rules shall be made in a summary way by summons.

Order LIV. Queen's Bench, &c., chambers.

(*a*) As to the practice in Chancery Chambers, see 15 & 16 Vict. c. 80, p. 120 to p. 137, *ante*, and Cons. Ord. XXXV. founded thereon, p. 137 to p. 155, *ante*, and the Registrars' Regulations, p. 165, *ante*.

Business before masters.

2. "In the Queen's Bench, Common Pleas, and Exchequer Divisions a "master, and in the Probate, Divorce, and Admiralty Division a registrar, "may transact all such business and exercise all such authority and juris- "diction in respect of the same as under the Act, or the schedule thereto, "or these rules, may be transacted or exercised by a judge at chambers, "except in respect of the following proceedings and matters: that is to "say,—

"All matters relating to criminal proceedings or to the liberty of the subject:
"The removal of actions from one division or judge to another division or judge:
"The settlement of issues, except by consent:
"Discovery, whether of documents or otherwise, and inspection, except by consent:
"Appeals from district registrars:
"Interpleader other than such matters arising in interpleader as relate to practice only, except by consent:
"Prohibitions:
"Injunctions and other orders under sub-sect. 8 of sect. 25 of the Act, or under Order LII., rules 1, 2, and 3 respectively:
"Awarding of costs, other than the costs of any proceeding before such master:
"Reviewing taxation of costs:
"Charging orders on stock funds, annuities, or share of dividends or annual produce thereof:
"Acknowledgments of married women.

2A. "The authority and jurisdiction of the district registrar or of a "master of the Queen's Bench, Common Pleas, or Exchequer Divisions "shall not extend to granting leave for service out of the jurisdiction of a "writ of summons or of notice of a writ of summons.

(The latter part of this rule, marked 2A, was added by r. 19 of June, 1876.)

Reference by master to judge.

3. "If any matter appears to the master proper for the decision of a "judge the master may refer the same to a judge, and the judge may "either dispose of the matter or refer the same back to the master with "such directions as he may think fit.

Appeal from master to judge.

4. "Any person affected by any order or decision of a master may "appeal therefrom to a judge at chambers. Such appeal shall be by "summons, within four days after the decision complained of, or such "further time as may be allowed by a judge or master.

No stay of proceedings

5. "An appeal from a master's decision shall be no stay of proceeding "unless so ordered by a judge or master.

to be by motion.

6. "In the Queen's Bench, Common Pleas, and Exchequer Divisions "every appeal to the Court from any decision at chambers shall be by "motion, and shall be made within eight days after the decision appealed "against." See *Berry* v. *Exchange Trading Co.*, L. R. 1 Q. B. D. 318.

ORDER LV.

Order LV. Costs.

Costs.

1. Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court (*a*); but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the Court shall otherwise order.

Costs in discretion of Court.

(*a*) *E.g.*, the costs of an executed attachment, *Abud* v. *Riches*, L. R. 2 Ch. Div. 528.

Costs of appeal.

Successful appellants are generally to have their costs, Memorandum, L. R. 1 Ch. Div. 1.

See further as to costs and as to the taxing-masters, Rules of the Supreme Court [Costs], *post*, p. 622.

Taxing-masters.

There is generally no appeal for costs, Judicature Act, 1873, s. 49, p. 354, *ante*, where see note.

No appeal for costs.

2. In any cause or matter in which security for costs is required the security shall be of such amount and given at such time or times and in such manner or form as the Court or a judge shall direct (*b*).

Security for costs.

(*b*) This rule was added by Rule 7 of February, 1876, which has been held to apply in the case of suits instituted under the old practice, *Republic of Costa Rica* v. *Erlanger*, L. R. 3 Ch. Div. 62, 24 W. R. 955.

Unless there is some special reason for increasing the amount (*Paxton* v. *Bell*, 24 W. R. 1013, W. N. (1876) 221) the old rule will prevail which was provided by Cons. Ord. XL. r. 6, that—

Cons. Ord. XL. r. 6.

One hundred pounds shall be the penal sum in the bond to be given as a security to answer costs *by any plaintiff who is out of the jurisdiction of the Court.*

Rule 6. Security for costs where plaintiff out of jurisdiction.

The amount may now be largely increased in a proper case, *Republic of Costa Rica* v. *Erlanger*, L. R. 3 C. D. 62; the amount has been increased if the plaintiff was asking for some indulgence, *e.g.*, to change a next friend or to *strike out the names of co-plaintiffs*, see *Fellowes* v. *Deere*, 3 Beav. 353; *Payne* v. *Little*, 16 Beav. 563; and as to fixing the amount, see *Davey* v. *Bennett*, 3 W. R. 353; *Hart* v. *Tulk*, 6 Hare 612. On an application by defendants in a suit by a company in liquidation, Malins, V.-C., ordered

Amount of security for costs.

Increased in special cases.

Order LV. Costs.

security sufficient to cover the costs of the defendants' answers, with liberty to renew their application for further security when their answers had been put in. On appeal it was held that the matter was one of discretion, and that apart from this the course adopted was convenient and proper, *Western of Canada Oil, Land and Works Co.* v. *Walker*, 45 L. J. Ch. Div. 165.

100*l.* paid into Court.

The plaintiff has been allowed to pay 100*l.* into Court instead of giving security, paying at the same time a sufficient sum to cover the expense of payment in and out (*Cliffe* v. *Wilkinson*, 4 Sim. 122), and paying the costs of the application, *Matthews* v. *Chichester*, 30 Beav. 135.

Who may be surety.

Solvency of surety.

The solicitors' undertaking to be answerable for costs is not sufficient, *Panton* v. *Labertouche*, 1 Ph. 265 ; *Re Norman*, 11 Beav. 401 ; and the surety must be solvent, *Cliffe* v. *Wilkinson*, *ubi. sup.* On the bankruptcy of a surety proceedings may be stayed, see *Lautour* v. *Holcombe*, 1 Ph. 262 ; *Veitch* v. *Irving*, 11 Sim. 122 ; and the defendant's costs of sending a clerk abroad to inquire into the solvency of the surety were allowed, *Bainbridge* v. *Moss*, 3 K. & J. 62. The bond of the British Guarantee Association, incorporated by Act of Parliament, was accepted as sufficient, *Plestow* v. *Johnson*, 1 Sm. & Giff. App. xx.

Guarantee Society.

Order how applied for.

Application for the order that a plaintiff may give security for costs should be made by summons in chambers, *Tynte* v. *Hodge*, 2 J. & H. 692. The order is that all proceedings be stayed till security is given, *Fox* v. *Blew*, 5 Madd. 147.

Security given to Record and Writs Clerks.

The security is to be given to the Clerk of Records and Writs in whose division the cause or matter is, Cons. Ord. I. 38, p. 441, *ante*.

Where several defendants.

Where there are several defendants, each may have a separate security, but the plaintiff need only divide one penalty among all, *Lowndes* v. *Robertson*, 4 Madd. 465.

Where plaintiff fails to give security ordered.

Where a plaintiff was ordered to give security, and made default, the defendant might move that he give security within a certain time, or that the bill be dismissed, see *Cooper* v. *Purton*, 1 N. R. 468, citing *Giddings* v. *Giddings*, 10 Beav. 29.

Discharge of order.

The order was discharged on a plaintiff coming within the jurisdiction in *Matthews* v. *Chichester*, 30 Beav. 135 ; *O'Connor* v. *Sierra Nevada Company*, 24 Beav. 435.

Defendant not compelled to give security.

A defendant, or person in any way compelled to litigate (*e.g.*, a plaintiff in a cross cause under the old practice), is not compelled to give security. Thus a shareholder of a company, though residing out of the jurisdiction, who appeared to oppose a petition for winding-up the company was not required to give security for costs, *In re Percy, &c., Mining Company*, L. R. 2 Ch. Div. 531; see *Cochrane* v. *Fearon*, 18 Jur. 568, where a defendant presented a petition in the suit and was not compelled to give security ; but where a suit was instituted for the purpose of impeaching an annuity deed, on the footing of which a decree had already been made in a former suit, it was held that the suit was not a proceeding by way of defence or a cross suit, so as to exempt the plaintiff from the ordinary rule, *Tynte* v. *Hodge*, 2 J. & H. 692 ; and where A. filed a bill against B. for specific performance of an agreement to transfer shares, and the company then filed a bill against A. and B. praying for a declaration that the contract was void, A. was allowed to call on the company to give security for costs, *Washoe Mining Company* v. *Ferguson*, L. R. 2 Eq. 371.

The following are the cases in which a plaintiff is required to give security for costs :—

(A) Cases where plaintiff gives security for costs.

(1) When he is *resident* out of the jurisdiction (under the rule above cited from the Cons. Ords.), and a plaintiff *domiciled* abroad, and only lodging in London had to give the security, *Ainslie* v. *Sims*, 17 Beav. 57 ; see *Swanzy* v. *Swanzy*, 4 K. & J. 237 ; *Cambottie* v. *Iangate*, 1 W. R. 533.

(1) If plaintiff *resides* or is *domiciled* or *goes abroad ;*

So if a plaintiff goes abroad during the suit, *Green* v. *Charnock*, 1 Ves. Jun. 396 ; *Hoby* v. *Hitchcock*, 5 Ves. 699 ; *Blakeney* v. *Dufaur*, 2 D. M. G. 271 ; *Edwardes* v. *Burke*, 9 L. T. N. S. 406 ; *Kennaway* v. *Tripp*, 11 Beav. 588 ; *Stewart* v. *Stewart*, 20 Beav. 322 ; and see *Baddeley* v. *Harding*, 6

Madd. 214 ; where the plaintiff was under sentence of transportation, *Seilaz* v. *Hanson*, 5 Ves. 261 ; but if the plaintiff goes abroad on public service or for a temporary purpose the rule does not apply, see *Colebroke* v. *Jones*, Dick. 154 (where the plaintiff was a consul abroad). As to officers, see *Evelyn* v. *Chippendale*, 9 Sim. 407 ; *Clark* v. *Fergusson*, 1 Giff. 184 ; *Fisher* v. *Bunbury*, Sausse & Scully, 625 ; *Miller* v. *Hales*, 43 L. J. Ch. N. S. 446 ; but from *Long* v. *Tottenham*, 1 Ch. Rep. 127, it seems it must distinctly appear that the plaintiff is abroad on foreign *service*. As to seafaring men, *Stewart* v. *Stewart*, 20 Beav. 322 ; *Lumley* v. *Hughes*, 2 W. R. 112 ; *Watts* v. *Kelly*, 6 W. R. 206 ; *Partington* v. *Reynolds*, 6 W. R. 307 ; *Gowram* v. *Bennett*, Sausse & Scully, 651. As to when the plaintiff is gone abroad for a temporary purpose without abandoning his residence in this country, see *Green* v. *Charnock*, 1 Ves. Jun. 396 ; *O'Connor* v. *Sierra Nevada Company*, 23 Beav. 608.

(2) When a plaintiff misdescribes himself, *post* ; and see as to misdescription, the plaintiff having changed his residence, *Kerr* v. *Gillespie*, 7 Beav. 269 ; *Campbell* v. *Andrews*, 12 Sim. 578 ; but if a misdescription is innocently inserted, and the defendant knows the real address, a motion for security for costs will be refused, *Smith* v. *Comfort*, 1 De G. & S. 684 ; and for instances of accidental errors in the plaintiff's description on account of which security was not required, see *Watts* v. *Kelly*, 6 W. R. 206 ; *Clark* v. *Clark*, 14 W. R. 449 ; and it is the defendant's duty, if the plaintiff cannot be found at the place of residence named in the bill, to make inquiries from the solicitor before he applys for security, *Knight* v. *Cory*, 11 W. R. 254 ; *Bailey* v. *Gundry*, 2 Keen, 53 ; *Manby* v. *Bewicke*, 8 D. M. G. 468 ; see *Hutchinson* v. *Swift*, 13 W. R. 532 ; *Dick* v. *Munden*, *ibid.* 1013 ; where the order was that the plaintiff should amend within a week by inserting his proper address, or else should give security. (2) If plaintiff misdescribes himself ;

(3) When persons sue who are privileged from process for contempt, *Goodwin* v. *Archer*, 2 W. R. 452 ; as to security to be given by a company, see *Imperial Bank of China* v. *Bank of Hindostan*, L. R. 1 Ch. 437 ; *City of Moscow Gas Co.* v. *International Finance Co.*, L. R. 7 Ch. 225 ; *Re Home Assurance Assoc.*, L. R. 12 Eq. 102 ; *Accidental Marine Assurance Co.* v. *Mercati*, L. R. 3 Eq. 200. (3) If plaintiff cannot be attached ; Company.

(4) Security for costs is not required from any plaintiff who is *sui juris* merely on account of his poverty, because he can be attached, *Hind* v. *Whitmore*, 2 J. & H. 562 ; but see *Burke* v. *Hutchinson*, 7 Ir. Eq. Rep. 708, where a pauper was ordered to give security for costs ; this case, however, which the Court considered one of gross fraud, depended on the special circumstances, and would not probably be generally followed ; see the comments on it in *Worrall* v. *White*, 3 Jo. & Lat. 513. There is also a case in the Exchequer (*Tredwell* v. *Byrch*, 1 Yo. & Coll. 476), in which a plaintiff, who filed a bill on behalf of himself and all other the rated inhabitants of a parish against certain commissioners, alleging a case of breach of trust, was ordered to find security for costs on account of his insolvency. (4) Not merely because plaintiff is poor,

A *relator* in a charity information, however, may be required to give security for costs on the ground of his poverty (*Attorney-General* v. *Skinner's Company*, 1 C. P. C. 1, 5 ; *Attorney-General* v. *Mayor of Rochester*, Reg. Lib. A. fol. 271, cited in Shelford on Mortmain) ; but *semble*, not where in an information and bill the relator is also the plaintiff (*Attorney-General* v. *Knight*, 3 My. & Cr. 154). In the last case the defendants appear to have proceeded by memorial to the Attorney-General, but in the two former cases by motion to the Court. except from a relator.

As to a defendant waiving his right by taking voluntary steps in the suit after notice of the facts entitling him to security, see *Atkins* v. *Cook*, 3 Dr. 694. If he acts without such notice he does not lose his right, though he might have discovered the facts by inquiry, *Swanzy* v. *Swanzy*, 4 K. & J. 257 ; see *Washoe Mining Company* v. *Ferguson*, 2 L. R. Eq. 371. Nor if the proceedings taken by him were forced on him, *Re Home Assurance Association*, L. R. 12 Eq. 112 ; *Macann* v. *Borradaile*, 16 W. R. 74 ; *e.g.*, by a motion for an injunction, *Murrow* v. *Wilson*, 12 Beav. 497, or for production of documents, *Cooper* v. *Purton*, 8 W. R. 702 ; nor where he demurs. Waiver of right to security.

Order LV. Costs.

without prejudice to his right, *Drinan* v. *Mannix*, 3 Dr. & W. 155. As to the right, once waived, being recovered on plaintiff's amendment or revivor, see *Wyllie* v. *Ellice*, 11 Beav. 99; *Jackson* v. *Davenport*, 29 Beav. 212; and see Morgan & Davey on Costs, 13, 14.

Security for costs from next friend.

Security for costs is required from the next friends of married women, but not from the next friends of infants, see note to Ord. XVI. r. 8, p. 476, *ante*.

Cons. Ord. XXXVII. r. 14.

By Cons. Ord. XXXVII. r. 14, it is provided as follows :—

When need not defend till plaintiff gives security.

The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed a defendant to plead, answer, or demur or otherwise make his defence to the suit.

Merely *taking out the summons* for security for costs does not prevent the time from running, *Henderson* v. *Atkins*, 7 W. R. 318. If, therefore, there is danger of the time running out before the order is made, the defendant should defend, giving notice that he does so without prejudice to his right to call for security, *Drinan* v. *Mannix*, 3 Dr. & W. 155.

Order LVI.

ORDER LVI.

Notices and Paper, &c.

Notices to be in writing.

1. All notices required by these rules shall be in writing, unless expressly authorised by a Court or judge to be given orally.

Mode of printing.

2. Proceedings required to be printed (*a*) shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a half wide.

(*a*) See Additional Rules, Aug., 1875, Ord. V., *post*.

Affidavits partly printed.

3. Any affidavit may be sworn to either in print (*b*) or in manuscript, or partly in print and partly in manuscript.

Ord. 16 May, 1862.

(*b*) As to printing affidavits, see Ord. XXXVIII. r. 6, p. 556, *ante*, and Additional Rules, Aug., 1875, Ord. V.

ORDER LVII.

Order LVII. Time.

TIME.

1. Where by these rules, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months (*a*).

Month means calendar month.

(*a*) This alters the former rule, Cons. Ord. XXXVII. r. 10.

2. Where any limited time (*b*) less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday (*c*) shall not be reckoned in the computation of such limited time.

Days not to be reckoned in time allowed.

(*b*) See Cons. Ord. XXXVII. r. 9, as to computation of days, which provides that—

Cons. Ord. XXXVIII. r. 9. Computation of time limited from certain event.

Where any limited time from or after any date or event is appointed or allowed for doing any act or taking any proceeding, and such time is not limited by hours, the computation of such limited time shall not include the day of such date or of the happening of such event, but shall commence at the beginning of the next following day; and the act or proceeding shall be done or taken at the latest on the last day of such limited time according to such computation.

(*c*) This rule and the next supersede Cons. Ord. XXXVII. r. 11.

Cons. Ord. XXXVII. r. 11. Where offices are closed when time expires.

3. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open (*d*).

(*d*) This is from Cons. Ord. XXXVII. r. 12: see *Taylor* v. *Jones*, L. R. 1 C. P. D. 87.

Order LVII. Time.

Where the time for doing an act, or taking a proceeding is expressly fixed by Act of Parliament, this rule does not enable such act or proceeding to be done or taken after the expiration of the time so fixed, *Flower* v. *Bright*, 2 J. & H. 590.

Service and amendment in long vacation.

4. No pleadings shall be amended or delivered in the long vacation, unless directed by a Court or a judge.

Long vacation not to be reckoned in time allowed.

5. The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading, unless otherwise directed by a Court or a judge (*e*).

(*e*) In all cases not specified in the corresponding rule, Cons. Ord. XXXVII. r. 13, vacations were counted in the computation of time, see *Bothomley* v. *Squire*, 7 D. M. G. 246 ; *Ware* v. *Watson*, *ibid.* 739 ; *Hitchen* v. *Hughes*, 14 W. R. 93.

Power to Court to enlarge or abridge time.

6. A Court or a judge shall have power to enlarge or abridge (*f*) the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

(*f*) Rule 8 of Feb., 1876, applies this to Admiralty actions. This rule supersedes Cons. Ord. XXXVII. rr. 17, 18.

Order LVIII.

ORDER LVIII.

Appeals.

Mode of appeal.

1. Bills of exceptions and proceedings in error shall be abolished.

Rehearing by motion.

2. All appeals to the Court of Appeal shall be by way of rehearing (*a*), and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is com-

plained of, and in the latter case shall specify such part (*b*). Order LVIII. Appeals.

(*a*) As to appeals to the House of Lords, see 39 & 40 Vict. c. 59, p. 384, *ante*; *Justice* v. *Mersey Coal and Iron Co.*, L. R. 1 C. P. D. 575.

(*b*) There is no inrolment of a decree under the present practice, *Hastie* v. *Hastie*, L. R. 2 C. D. 304; but only the Lord Chancellor can deal with inrolments made before the Act, *Allan* v. *U. K. Telegraph Company*, 24 W. R. 898. No inrolment.

Appeals are not allowed where the amount at stake is insignificant, *Re Cross*, L. R. 7 Ch. 221. No appeal for trifling amount;

Nor in the following cases—

(1) For costs alone, see Judicature Act (1873), s. 49, *ante*; *Witt* v. *Corcoran*, L. R. 2 C. D. 69, 34 L. T. N. S. 550. for costs alone;

(2) Where there was a submission to the judge personally, *Ex parte Wilson*, L. R. 7 Ch. 45; *Bustros* v. *White*, L. R. 1 Q. B. D. 423, 45 L. J. Q. B. Div. 642. from point submitted to judge;

(3) Where the order is drawn up as made by consent, *Carew* v. *Cooper*, 12 W. R. 767; *Cookes* v. *Cookes*, 12 Jur. 294; but see as to cases of fraud, *Brooke* v. *Lord Mostyn*, 13 W. R. 115; *Anon.*, 1 Ves. Jun. 93. from consent orders;

(4) Where the order was made in a matter within the discretion of the judge, see *Golding* v. *Wharton Railway Co.*, L. R. 1 Q. B. D. 374, 34 L. T. N. S. 474; *Sheffield* v. *Sheffield*, 44 L. J. Ch. N. S. 304. from orders in judge's discretion.

By the Registrar's Regulations, 15 March, 1860, rr. 11, 12, it is provided as follows: Registrars' regulations.

11. Appeal motions are to be set down at least two clear days before the day for which the notice is given, upon production of the order appealed from, or an office copy thereof, and a copy of the notice of motion, which is to be filed. Setting down appeal motions.

12. Petitions for a re-hearing before either of the Vice-Chancellors or before the Lord Chancellor or Lords Justices, and petitions of appeal are to be set down upon an order to be drawn up by the registrar pursuant to the fiat of the Lord Chancellor inscribed on the petition, and upon payment of the usual deposit. Petitions for a rehearing before the Master of the Rolls are to be set down upon an order drawn up by his secretary, and upon payment of the usual deposit. All petitions of appeal or rehearing are to be marked in the cause-book as not to be in the paper for hearing before the expiration of six clear days from the day of setting down. Re-hearings and appeals.

3. The notice of appeal shall be served upon all parties directly affected by the appeal (*c*), and it shall not be necessary to serve parties not so affected; but the Court of Appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Court of Appeal may seem fit. Notice of appeal to parties affected.

(*c*) See *Hunter* v. *Hunter*, 24 W. R. 504.
It was provided by Cons. Ord. XXXI. r. 7, that— Cons. Ord. XXXI. r. 7.

Order LVIII. Appeals.

Rule 7. Party served.

7. *Where a party who has been duly served with a copy of an order for setting down a cause to be reheard on a petition of appeal or for a rehearing, does not appear on the rehearing, there, on proof by affidavit of such service, such order shall be made upon the rehearing as under the circumstances of the case shall appear to be just.*

Compare rr. 18 and 19 of Ord. XXXVI., p. 545, *ante*.

Length of notice.

4. Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice.

Court of appeal may receive further evidence on special grounds;

5. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence (*d*) upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought (*e*). Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only (*f*), and not without special leave of the Court. The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision (*g*). The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just (*h*).

and evidence of facts occurring after decree.

Special leave.

Varying decree for parties not appealing.

(*d*) An appellant desiring to produce further evidence (see *Justice* v. *Mersey Steel and Iron Co.*, L. R. 1 C. P. D. 575; and *Re Coal Economising Co.*, 24 W. R. 36; *Purnell* v. *G. W. Ry. Co.*, *ibid.*, 720), should give notice to the other side that he will apply at the hearing of the appeal for leave, *Hastie* v. *Hastie*, L. R. 1 Ch. Div. 562.

Leave to produce further evidence.

(*e*) Such facts used to be brought before the Court by bill of review.

(*f*) Under the former practice (Cons. Ord. XXXI. rr. 9—14) the Court admitted new matter which had been "*discovered since the decree, and could not possibly have been used* "*when the decree was made*" (Cons. Ord. XXXI. 10). It had therefore to be shown that reasonable diligence had been used; but see, for the case of an infant, *Re Hoghton*, L. R. 18 Eq. 573.

Cons. Ord. XXXI. rr. 9–14.

New facts.

It was held that the new evidence adduced must be such as would have been likely, if added to the evidence before brought forward, to have turned the scale, *Hungate* v. *Gascoigne*, 2 Ph. 25; *Wason* v. *Westminster Improvement Commissioners*, 4 L. T. N. S. 80; *Thomas* v. *Rawlings*, 34 Beav. 50, and see *Re Warwick, &c., Railway Company*, 9 W. R. 329; *Creswell* v. *Jackson*, 11 L. T. N. S. 530; *Young* v. *Keighly*, 16 Ves. 350; *Hosking* v. *Terry*, 10 W. R. 384.

New documentary evidence.

As to new documentary evidence, see *Glover* v. *Daubney*, 9 Jur. N. S. 90; *Re Wiltshire Iron Company*, L. R. 3 Ch. 443, 8; *Ex parte Isaac*, L. R. 6 Ch. 58.

Mistaken evidence.

Where witnesses had made a mistake in their evidence, it was doubtful if the mistake could be corrected on appeal, as they might have been cross-examined, *Land Credit Company of Ireland* v. *Lord Fermoy*, L. R. 5 Ch. 763.

Varying decree in favour of other parties.

(*g*) See, under the old practice, *Middlemas* v. *Wilson*, L. R. 10 Ch. 230; and, under the new practice, *Hunter* v. *Hunter*, 24 W. R. 527. Formerly parties who had not appealed could not be heard in support of the appeal, but might be heard in support of the decree appealed from. It was held, under the old practice, that the original decree might be varied in respect of all parties, though some only had appealed, for the whole decree was open on a rehearing, *Kent* v. *Freehold Land & Brickmaking Company*, L. R. 3 Ch. 493, 495; see *Parrott* v. *Palmer*, 3 My. & K. 646.

Who may appeal.

Persons served with notice of a decree, p. 187, *ante*, may appeal, *Ellison* v. *Thomas*, 1 D. J. S. 18; *Kidd* v. *Cheyne*, 18 Jur. 348.

One co-plaintiff appealed against another, *Jopp* v. *Wood*, 2 D. J. S. 323.

Persons not parties to the cause may appeal if materially interested in the order to be appealed from, *Parmiter* v. *Parmiter*, 2 D. F. J. 526; *Jopp* v. *Wood* (2), 33 Beav. 372; *Leate* v. *Jenkins*, 14 W. R. 489; *Bruff* v. *Cobbold*, L. R. 7 Ch. 217.

Costs.

(*h*) A successful appellant will, in the absence of special circumstances, have his costs of the appeal, *Olivant* v. *Wright*, 45 L. J. Ch. Div. 1.

Notice of cross appeal by respondent.

6. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal (*i*); but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall, within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

Order LVIII. Appeals.

(*i*) The Court entertained a respondent's appeal on a point in which the original appellant had no interest, *Hunter* v. *Hunter*, W. N. (1876) 138.

Time for notice.

7. Subject to any special order which may be made, notice by a respondent under the last preceding rule shall in the case of any appeal from a final judgment be an eight days' notice, and in the case of an appeal from an interlocutory order a two days' notice.

Entering appeals.

* See Ord. LX. r. 2.

† Cons. Ord. XXXI. r. 6.

8. The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal * the judgment or order or an office copy thereof (*k*), and shall leave with him a copy of the notice of appeal to be filed,† and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof shall otherwise direct (*l*), but so as not to come into the paper for hearing before the day named in the notice of appeal.

(*k*) An office copy of the order need not be left when the appeal is from an interlocutory order, *Smith* v. *Grindley*, L. R. 3 C. Div. 80; 24 W. R. 956.

Advancing appeals.

(*l*) See *Lazenby* v. *White*, L. R. 6 Ch. 89; *London, Chatham, & Dover Railway* v. *Imperial Credit Association*, L. R. 3 Ch. 231, for cases in which appeals will be advanced.

An appeal against a decision overruling a demurrer may be advanced if the right to an injunction is involved, *L. C. & D. Coy.* v. *Imperial Credit Association*, L. R. 3 Ch. 231.

Time for appeal in winding-up or bankruptcy cases;

9. The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Act, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under rule 15.

from refusal of *ex parte* applications.

10. Where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex parte within four days from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Appeal Court may allow.

Evidence of questions of fact on appeal.

11. When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such

question shall, subject to any special order, be brought before the Court of Appeal as follows: Order LVIII. Appeals.

(*a.*) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed (*m*).

(*b.*) As to any evidence given orally, by the production of a copy of the judge's notes (*n*), or such other materials as the Court may deem expedient.

(*m*) Where the affidavits were long, and had not been printed, the officer of the Court below, who had charge of them, was ordered to attend with them for the use of the Court of Appeal, to save expense, *Sickles* v. *Morris*, 24 W. R. 102; and see *Crawford* v. *Hornsea Steam Co.*, 24 W. R. 422, 34 L. T. 923. Affidavits.

(*n*) See next note. This rule follows r. 14 of Order of 5th February, 1861.

12. Where evidence has not been printed in the Court below, the Court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purpose of the appeal (*o*). Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order.

(*o*) Copies of the judge's notes were ordered to be printed for use on an appeal by Lindley, J., W. N. (1876) 23. The charge for a copy of a short-hand writer's notes of the proceedings in a county court was allowed as part of the costs of an appeal, *Ex parte Sawyer*, L. R. 1 C. D. 698. Judge's notes printed.

13. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient. Notes of judge's ruling or direction.

14. No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may seem just. Interlocutory order not to prejudice appeal.

15. No appeal from any interlocutory order shall, except by special leave (*p*) of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave (*p*), be brought after Appeals from interlocutory orders to be in 21 days, other appeals in one year.

Order LVIII. Appeals.

the expiration of one year. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal (*q*). Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal (*r*).

Time for appeal enlarged.

(*p*) As to application for enlargement of time under the old practice, see *Patch* v. *Ward*, L. R. 9 Ch. 69; *Re Limehouse Coy.*, L. R. 9 Ch. 267; *Home* v. *Barton*, 8 D. M. G. 587; *Wellesley* v. *Wellesley*, 3 De G. & J. 164, 9 H. L. 525; *Moneypenny* v. *Dering*, 4 De G. & J. 175; *Walmsley* v. *Foxhall*, 1 D. J. S. 451; *Kay* v. *Smith*, 7 D. M. G. 383; *Wildeman* v. *Lade*, 4 De G. & J. 401; *Hill* v. *Curtis*, L. R. 1 Ch. 425; *Home* v. *Barton*, 8 D. M. G. 587.

Appeal from refusal of application.

(*q*) A motion was held to be *simply refused* (so as reckon the time for appealing from hearing) though it was also ordered that the costs should be costs in the cause, *Swindell* v. *Birmingham Syndicate*, W. N. (1876) 217, 24 W. R. 911.

Security for costs on appeal.

(*r*) A plaintiff appealed from a decree dismissing his bill. Upon proof of his having no means to answer the costs of an appeal, the appeal was stayed until he made a deposit of £50; but the Court declined to order that in default of his doing so within a given time the appeal should be dismissed, *Wilson* v. *Smith*, L. R. 2 C. D. 69, 34 L. T. N. S. 470; see *Stock* v. *Hooper's Telegraph Works*, W. N. (1876) 230. A bond with sureties was allowed in *Phosphate Sewage Co.* v. *Hartmont*, L. R. 2 C. D. 811.

Where the defendant appealing was not a man of substance, but merely a nominal defendant, the appeal was stayed until security was given, *Corporation of Hastings* v. *Ivall*, L. R. 9 Ch. 758, 43 L. J. N. S. Ch. 728.

Where an appeal was ordered to stand over to enable the pleadings to be amended, and the respondent subsequently applied for security for costs under this rule, the application was refused, but without prejudice to any future application as to costs which might be occasioned by the appeal standing over and the liberty to amend, *Grant* v. *Banque Franco Egyptienne*, L. R. 1 C. P. D. 143, 34 L. T. N. S. 470.

Notice of motion for security.

Notice of motion by a respondent that the appellant may be directed to give security for the costs of an appeal may be served without leave, *Grills* v. *Dillon*, L. R. 2 Ch. Div. 325; 34 L. T. N. S. 781.

Appeal deposit under Cons. Ord. XXXI. rr. 4, 5.

Formerly by Cons. Ord. XXXI. rr. 4 and 5, an appellant had to deposit 20*l.* with the registrar as an appeal deposit, to be paid to the opposite party if he obtained no material variations of the decree.

Stay of proceedings.

16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct (*s*).

Cons. Ord. XXXI. r. 2, VI. r. 12.

(*s*) This rule is founded on Cons Ord. XXXI. r. 2.

Order LVIII. Appeals.

The application to stay proceedings is, according to Cons. Ord. VI. r. 12, and the next rule, to be made first to the judge who pronounced the order.

Application to stay proceedings pending an appeal.

But see *Earl of Shrewsbury* v. *Trappes*, 2 D. F. J. 172, where the application was to the Court of Appeal; *Price* v. *Salisbury*, 11 W. R. 1014; *Walford* v. *Walford*, L. R. 3 Ch. 813, and the next rule.

Notice to be given.

The application to stay proceedings pending the appeal is by motion after notice, *Herring* v. *Clobery*, 12 Sim. 410; *Republic of Peru* v. *Weguelin*, 24 W. R. 297.

When granted.

The application has been granted where irreparable mischief would otherwise be likely to ensue, *e.g.*, where the plaintiff declined to give security for repayment of rents, or of costs in the event of a reversal of the decree, *Barrs* v. *Fewkes*, L. R. 1 Eq. 392, and where the appellant was a solicitor who had been ordered to remove his name from a house where his business had been carried on many years, *Walford* v. *Walford*, L. R. 3 Ch. 813; appeals being conducted with greater rapidity than formerly, these applications have been more frequently granted; and see *Gibbs* v. *Daniel*, 4 Giff. 41, note; *Ralli* v. *Universal Marine Assurance Company*, 10 W. R. 327. A plaintiff having obtained an order for production of documents, was restrained from inspecting them, pending an appeal from the order, *Kelly* v. *Hutton*, 15 W. R. 916. A shareholder pronounced a contributory was allowed to pay calls into Court, pending an appeal, *Jopp's case*, 2 W. N. (1867) 192; *Colyer* v. *Finch*, 20 Beav. 555; *Bourne* v. *Buckton*, 35 L. J. Ch. 851; *Lord* v. *Colvin*, 1 Dr. & Sm. 475; *Wood* v. *Farthing*, 8 W. R. 425; *Portarlington* v. *Damer*, 11 W. R. 869; *Price* v. *Salisbury*, *ibid.*, 1014; *Garcias* v. *Ricardo*, 1 Ph. 498; *Aberaman Iron Works* v. *Wickens*, L. R. 5 Eq. 485, 519.

When defendant need not answer pending appeal as to demurrer.

So where a demurrer to discovery has been overruled, and the defendant appeals, the Court will stay proceedings to enforce an answer if there has been no delay, or if the defendant would be prejudiced by answering, *Drake* v. *Drake*, 8 Hare, 528; *Garcias* v. *Ricardo*, 1 Ph. 498; *Saunders* v. *Richardson*, 2 W. R. 358.

When refused.

But the application has been refused where the appeal has been considered hopeless (see *Lord* v. *Colvin*, 1 Dr. & Sm. 475), or if the effect of staying proceedings would be a reversal of the order; thus where an injunction had been granted and a motion for a new trial of issues was being carried by appeal to the House of Lords, the Court refused to dissolve the injunction pending the appeal, *Penn* v. *Bibbey*, 3 L. R. Eq. 308. So where an injunction was refused the defendant could not be restrained, pending an appeal, *Galloway* v. *Mayor of London*, 3 D. J. S. 59; see *Atherton* v. *British Nation Assurance Society*, L. R. 5 Ch. 720. And where the defendant had been ordered to execute a conveyance, and applied to suspend such execution, pending an appeal, the application was refused, on the plaintiff consenting that notice of the appeal should be endorsed on the conveyance, *Wilson* v. *West Hartlepool Railway Company*, 34 Beav. 414. A defendant ordered to transfer articles of furniture to the plaintiff was not allowed to retain them pending an appeal, *Harrington* v. *Harrington*, L. R. 3 Ch. 564. And costs have been ordered to be paid into Court notwithstanding an appeal, *Colyer* v. *Colyer*, 10 W. R. 748; *Archer* v. *Hudson*, 8 Beav. 321; see *Burdick* v. *Garrick*, L. R. 5 Ch. 543; but see *Merry* v. *Nickalls*, L. R. 8 Ch. 205; *Cooper* v. *Cooper*, L. R. 2 Ch. Div. 492; and terms have been imposed on the party appealing and desiring to stay proceedings, *Taylor* v. *Midland Railway Company*, 9 W. R. 154; *McIntosh* v. *Great Western Railway Company*, 13 W. R. 1029; *Monypenny* v. *Monypenny*, 8 W. R. 430.

In case of *injunction*.

Terms imposed on party appealing.

When decree impeached for fraud.

An order staying proceedings where there was an appeal pending, but only a bill impeaching a decree for fraud was dismissed as irregular, *Whitehead* v. *Lynes*, 12 L. T. N. S. 332.

Costs of motion to stay proceedings.

The costs of the motion are in the discretion of the Court, *Burdick* v. *Garrick*, L. R. 5 Ch. 453; but see *Barrs* v. *Fewkes*, 1 L. R. Eq. 392; *Wilson* v. *West Hartlepool Ry.*, 34 Beav. 414; generally, the appellant has to pay the costs of the application, *Merry* v. *Nichalls*, L. R. 8 Ch. 205; *Cooper* v. *Cooper*, L. R. 2 C. D. 492.

Order LVIII. Appeals.

Application to be made first to court below.

17. Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or judge below (*t*).

(*t*) A motion before the Court of Appeal under this rule is not an appeal but an original motion, *Cooper* v. *Cooper*, L. R. 2 Ch. D. 492, where it was said that the rule in *Merry* v. *Nicholls*, L. R. 8 Ch. 205, *ante*, was still in force.

Application by motion.

18. Every application to a judge of the Court of Appeal shall be by motion, and the provisions of Order LIII. shall apply thereto.

Divisional Courts for appeals from County Courts.

19. In order to constitute Divisional Courts for the determination of appeals from inferior Courts (*u*) under section 45 of the Judicature Act, 1873 (*x*), each division of the High Court of Justice shall, before the 1st of January, 1876, select one of the judges of such division to act until the 1st of January, 1877, and so on before every 1st of January subsequent to the 1st of January, 1876, to act for the twelve months next ensuing.

Any two or more of the judges so selected shall constitute a Divisional Court for the purpose of the said section.

Any other judge of the High Court of Justice may, by arrangement between himself and any one of the judges so selected, act for such last-mentioned judge in any particular case or cases, or on any particular day or days.

The judges so selected shall make such arrangements as they shall think fit, as to the manner in which application may be made to them, or any of them, in Court or chambers, under the 6th sect. of 38 & 39 Vict. c. 50, relative to appeals by motion under that Act.

(*u*) This rule was added by the 16th rule of December, 1875, see p. 642, *post*.

(*x*) See p. 353, *ante*.

Order LIX.

ORDER LIX.

Effect of Non-compliance.

Irregular proceedings.

Non-compliance with any of these rules shall not render the proceedings in any action void (*a*) unless the Court or

a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as a Court or judge shall think fit. Order LIX. Effect of non-compliance.

(*a*) It was held under the old practice—

An order irregularly obtained must be properly discharged, and cannot be treated as a nullity. See *Wilkins* v. *Stevens*, 10 Sim. 617; *Blake* v. *Blake*, 7 Beav. 514; *Fennings* v. *Humphrey*, 4 Beav. 1; *Chuck* v. *Cremer*, 2 Ph. 113. Irregular order not a nullity.

But where a notice of motion was irregularly given it was held that the parties to whom it was given need not have appeared upon the motion, and they were not allowed their cost of doing so, *Daubney* v. *Shuttleworth*, L. R. 1 Ex. D. 53, 34 L. T. N. S. 357.

As to the power to dispense with the strict requirements of the general orders, where justice requires, see *Smith* v. *Baker*, 2 H. & M. 498; *Ferrand* v. *Mayor of Bradford*, 8 D. M. G. 93; *Betts* v. *De Vitre*, 15 W. R. 701; *Re Hutchinson*, W. N. (1867) 49; *Re Snell*, 19 W. R. 1000; and see, as to advertisements, notes to order under Settled Estates Act, *ante*, p. 225; and the rules must not be constructed too strictly in bad faith, *Talbot* v. *Keay*, L. R. 8 Eq. 610. Power to dispense with strictness of rules.

An irregularity may be waived by the other side, see *Kettlewell* v. *Barstow*, L. R. 10 Eq. 210; but an application to restore a suit which was dismissed after an order to speed was refused, *Burkinshaw* v. *Wilson*, L. R. 12 Eq. 103. Waiver of irregularity.

ORDER LX. Order LX.

Officers.

1. All officers who at the time of the commencement of the said Act shall be attached to the Court of Chancery (*a*), shall be attached to the Chancery Division of the said High Court. Chancery officers.

[The rest of the section provides similarly for officers attached to the Court of Queen's Bench, Common Pleas, &c.]

(*a*) See as to the Record and Writ Clerks, p. 440, *ante*, and as to the Registrars, p. 562, *ante*.

2. Officers attached to any division shall follow the appeals from the same division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the registrars and officers of the Court of Chancery usually performed as to re-hearings in the Court of Appeal in Chancery, and as the masters and officers of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber. Officers to follow appeals.

Order LXI. Sittings and Vacations.

ORDER LXI.

Sittings and Vacations.

Sittings of courts.

1. The sittings (*a*) of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings.

The Michaelmas sittings shall commence on the 2nd of November and terminate on the 21st of December; the Hilary sittings shall commence on the 11th of January and terminate on the Wednesday before Easter; the Easter sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whitsunday.

The Trinity sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August.

Cons. Ord. V. (*a*) Cons. Ord. V. seems to be superseded by this order.

Vacations.

2. The vacations to be observed in the several courts and offices of the Supreme Court shall be four in every year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation.

The Long vacation shall commence on the 10th of August and terminate on the 24th of October. The Christmas vacation shall commence on the 24th of December and terminate on the 6th of January.

The Easter vacation shall commence on Good Friday and terminate on Easter Tuesday, and the Whitsun vacation shall commence on the Saturday before Whitsunday and shall terminate on the Tuesday after Whitsunday.

First and last days inclusive.

3. The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.

Offices when closed.

4. The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and

all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.

Offices of district registrar.

4A. The offices of each district registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the registrar of the county court of the place in which the district registry is situate are required to be kept open (*b*).

(*b*) The offices of the Supreme Court, including the judges' chambers shall close on Saturdays at two o'clock.
The latter clause of this rule was added by r. 15 of Dec., 1875, and r. 9 of Ord. Feb., 1876.

Vacation judges.

5. Two of the judges of the High Court shall be selected at the commencement of each long vacation for the hearing in London or Middlesex during vacation of all such applications as may require to be immediately or promptly heard. Such two judges shall act as vacation judges for one year from their appointment. In the absence of arrangement between the judges, the two vacation judges shall be the two judges last appointed (whether as judges of the said High Court or of any Court whose jurisdiction is by the said Act transferred to the said High Court) who have not already served as vacation judges of any such Court, and if there shall not be two judges for the time being of the said High Court who shall not have so served, then the two vacation judges shall be the judge (if any) who has not so served and the senior judge or judges who has or have so served once only according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a vacation judge.

Vacation business.

6. The vacation judges may sit either separately or together as a Divisional Court as occasion shall require, and may hear and dispose of all actions, matters, and other business (*c*) to whichever division the same may be assigned. No order made by a vacation judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or a judge thereof, or the judge who made the order (*d*). Any other judge of the High Court may sit in vacation for any vacation judge (*e*).

Judge sitting for vacation judge.

Order LXI. Sittings and Vacations.

(*c*) As to what is vacation business, see *Re Wigan Junction Railways Act*, 10 L. R. Ch. 541.

(*d*) See *Man* v. *Ricketts*, 9 Beav. 4; *Warrick* v. *Queen's College*, 37 L. J. Ch. 597, decided on the similar rule 11 of Cons. Ord. VI.

What is vacation business.

Cons. Ord. VI. r. 11.

Where Court has risen.

(*e*) Where an application ought to be made before a Court which has risen, any judge who is sitting may hear it, *Price* v. *Gardner*, 1 Jur. N. S. 975. See *Bean* v. *Griffith*, *ibid.*, 1045, for the jurisdiction of the vacation judge to hear applications in causes pending in any of the courts commences when that Court rises for the vacation, though it may have risen before the time provided for the commencement of the vacation, *Francis* v. *Browne*, 10 W. R. 811; *Holloway* v. *Phillips*, 22 L. J. Ch. 1091.

Intervals between sittings.

7. The vacation judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any division of the High Court to which such business may be assigned, although such interval may not be called or known as a vacation.

Sittings of official referees.

8. The official referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity sittings of the High Court of Justice, except on Saturdays, during such sittings, when they shall sit, at least, from 10 a.m. to 2 p.m.; but nothing in this rule shall prevent their sitting on any other days (*f*).

(*f*) This rule was added by r. 10 of Feb., 1876, and is there numbered as r. 10 of this order.

Order LXII.

ORDER LXII.

Exceptions from the Rules.

Practice in certain proceedings not affected.

Nothing in these rules shall affect the practice or procedure in any of the following causes or matters:—

Criminal proceedings;

Proceedings on the Crown side of the Queen's Bench Division;

Proceedings on the Revenue side of the Exchequer Division;

Proceedings for Divorce or other Matrimonial Causes.

ORDER LXIII.

Order LXIII. Interpretation.

INTERPRETATION OF TERMS.

Interpretation clause.

The provisions of the 100th section of the Act shall apply to these rules (*a*).

Meaning of

In the construction of these rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following:—

Person;

"Person" shall include a body corporate or politic;

"Probate actions" shall include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business;

Proper officer;

"Proper officer" shall, unless and until any rule to the contrary is made, mean an officer to be ascertained as follows:—

(*a*) Where any duty to be discharged under the Act or these rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same;

(*b*) Where any new duty is under the Act or these rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any division, by the Lord Chancellor, and in the case of an officer attached to any division, by the president of the division, and in the case of an officer attached to any judge, by such judge;

The Act;

"The Act" and "the said Act" shall respectively mean the Supreme Court of Judicature Act, 1873, as amended by this Act.

(*a*) The section 100 referred to interprets *inter alia*, "cause," "suit," "plaintiff (to include every person asking relief by motion, petition, summons, &c.), petitioner, defendant, party (to include persons served) pleading (to include petition, summons, &c.).

"cause,"
"plaintiff,"
"party,"
"pleading."

Additional Orders I., II., August, 1875. Printing.

ADDITIONAL RULES AUGUST, 1875.

ORDER OF HER MAJESTY IN COUNCIL, DATED AUG. 12, 1875.

The order recites sect. 17 of the Judicature Act, 1875, and continues—

Now therefore Her Majesty, in pursuance of the said Act and by and with the advice of Her Privy Council, and upon the recommendation of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, and a majority of the other judges of the several courts intended to be united and consolidated by the said principal Act as amended by the said Act, is pleased to make and issue the additional rules of Court (*a*) following for the purposes aforesaid :—

Mode of citation.

(*a*) These may be cited as "The Rules of the Supreme Court (Costs)," see rule 1 of Rules of Supreme Court, December, 1875, p. 642, *post*.

ORDER. I.

Written depositions to be printed.

Where any written deposition of a witness has been filed for use on a trial (*b*), such deposition shall be printed, unless otherwise ordered.

(*b*) See Ord. XXVIII. r. 6, p. 556, and Ord. LVI. r. 3, p. 606, *ante*.

ORDER II.

Depositions and affidavits used in interlocutory applications need not be printed.

The rules of Court as to printing depositions and affidavits to be used on a trial, shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed.

ORDER III.

Additional Orders, III—V. August, 1875. Printing.

Other affidavits than those required to be printed by Order XXXVIII. rule 6, in the schedule to the Supreme Court of Judicature Act, 1875, may be printed if all the parties interested consent thereto, or the Court or judge so order.

Printing of affidavits not in actions.

ORDER IV.

The 3rd rule of the Order XXXIV. in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to a special case, pursuant to the Act of 13 & 14 Victoria, c. 35 (*c*).

Printing special cases.

(*c*) See p. 118, 530, *ante*.

ORDER V.

Where, pursuant to rules of Court, any pleading, special case, petition of right, deposition, or affidavit is to be printed (*d*), and where any printed or other office copy thereof is to be taken, the following regulations shall be observed :—

Where copies of printed pleadings, affidavits, &c., are to be taken.

1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by rule 2 of Order LVI. in the first schedule to the Supreme Court of Judicature Act, 1875.

Documents to be printed from office copy.

2. To enable the party printing to print any deposition, the officer* with whom it is filed shall on demand deliver to such party a copy (*d*) written on draft paper on one side only.

* See Cons. Ord. I. rr. 35, 36, p.

(*d*) The copies are now, by these regulations, to be made by the party filing, whereas Cons. Ord. XXXVI. formerly provided for copies to be made by the officers of the Court.

Cons. Ord. XXXVI.

3. The party printing shall, on demand in writing, furnish to any other party or his solicitor any number of printed copies (*e*) not exceeding ten, upon payment

Payment for printed copies furnished.

Additional Order V. August, 1875. Copies.

therefore at the rate of 1d. per folio for one copy, and ½d. per folio for every other copy.

(*e*) As to copies of documents produced in answer to interrogatories, see reg. 16, p. 634, *post*.

Copies of documents produced for discovery.

4. The solicitor of the party printing shall give credit for the whole amount payable by any other party for printed copies.

Credit to be given.

No charge for copying in writing.

5. The party entitled to be furnished with a print shall not be allowed any charge in respect of a written copy, unless the Court or judge shall otherwise direct.

Party to have office copy marked.

*Cons. Ord. I. rr. 35 and 36, p. 440, *ante*.

6. The party by or on whose behalf any deposition, affidavit, or certificate, is filed, shall leave a copy with the officer with whom the same is filed,* who shall examine it with the original and mark it as an office copy—such copy shall be a copy printed as above provided where such deposition or affidavit is to be printed (*f*).

Cons. Ord. XXXVI. r. 2.

(*f*) This regulation corresponds with Cons. Ord. XXXVI. r. 2. No record is to be carried away from the public Record Office (Cons. Ord. I. r. 42, p. 442, *ante*), unless by order of the Court, see *Att.-Gen.* v. *Ray*, 6 Beav. 335; *Jervis* v. *White*, 8 Ves. 313; *Lamb* v. *Danby*, 9 W. R. 765.

And produce it on proceedings.

7. The party or solicitor who has taken any printed or written office copy of any deposition or affidavitis to produce the same upon every proceeding to which the same relates (*g*).

(*g*) This regulation is from Cons. Ord. XXXVI. r. 10.

Copies of affidavits, proceedings, and documents *not* required to be printed.

8. Where any party is entitled to a copy of any deposition, affidavit, proceeding, or document filed or prepared by or on behalf of another party, which is not required to be printed, such copy shall be furnished by the party by or on whose behalf the same has been filed or prepared (*h*).

(*h*) This and the following three regulations are from Cons. Ord. XXXVI. rr. 3—6, 9.

To be furnished. on request in twenty-four hours.

9. The party requiring any such copy, or his solicitor, is to make a written application to the party by whom the copy is to be furnished, or his solicitor, with an

undertaking to pay the proper charges (*k*), and thereupon such copy is to be made and ready to be delivered at the expiration of twenty-four hours after the receipt of such request and undertaking, or within such other time as the Court or judge may in any case direct, and is to be furnished accordingly upon demand and payment of the proper charges. Additional Order V. August, 1875.

(*k*) The following rule as to charges is from Cons. Ord. XXXVI. r. 13— Cons. Ord. XXXVI. r. 13.

The taxing-master shall not allow any costs in respect of any copy so taken as aforesaid, unless the same shall appear to him to have been requisite, and to have been made with due care, both as regards the contents and the writing thereof. Costs of written copies.

A solicitor concerned for two or more parties is not allowed to charge for supplying to himself copies of documents, which copies he has himself prepared, see *Sharp* v. *Wright*, L. R. 1 Eq. 634, see r. 6, p. 630, *post*. Same solicitor for both parties.

Documents previously existing in print cannot be charged for as copies, *Underwood* v. *Secretary of State in Council*, 16 W. R. 752, 926. Documents in print.

10. In the case of an ex parte application for an injunction or writ of ne exeat regno, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court (*l*). Copies of affidavits in the case of certain *ex parte* applications.

(*l*) See note to reg. 8, *supra*.

11. It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit, or set of affidavits, and copied on every office copy and copy furnished to a party (*m*). Note at foot of affidavit.

(*m*) This regulation is from Ord. 5 Feb. 1861, r. 18. Ord. 5 Feb. 1861, r. 18.

12. The name and address of the party or solicitor by whom any copy is furnished is to be endorsed thereon in like manner as upon proceedings in Court, Party to be answerable for correct copies.

Additional Order V. August, 1875.

and such party or solicitor is to be answerable for the same being a true copy of the original, or of an office copy of the original, of which it purports to be a copy, as the case may be (*n*).

Cons. Ord. XXXVI. r. 8.

(*n*) This and the next regulation are from Cons. Ord. XXXVI. r. 8.

Folios to be numbered, &c.

13. The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies.

If copy not furnished in time.

14. In case any party or solicitor who shall be required to furnish any such written copy as aforesaid shall either refuse or, for twenty-four hours from the time when the application for such copy has been made, neglect to furnish the same, the person by whom such application shall be made, shall be at liberty to procure an office copy from the office in which the original shall have been filed, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for (*o*).

(*o*) This regulation takes the place of Cons. Ord. XXXVI. rr. 6, 12.

Judge may give special directions as to expense of printing and furnishing of copies.

15. Where, by any order of the Court (whether of appeal or otherwise) or a judge, any pleading, evidence, or other document is ordered to be printed, the Court or judge may order the expense of printing to be borne and allowed, and printed copies to be furnished by and to such parties and upon such terms as shall be thought fit.

ORDER VI.

Costs of proceedings.

The following regulations as to costs of proceedings in the Supreme Court of Judicature shall regulate such costs from the commencement of the Supreme Court of Judicature Acts, 1873 and 1875:—

Additional Order VI. August, 1875.

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "Lower Scale" in the schedule hereto (*p*)—

Lower scale.

In all actions for purposes to which any of the forms of Indorsement of Claim on Writs of Summons in sections II.,* IV.,† and VII.‡ in Part II. of Appendix A, referred to in the 3rd rule of Order III. in the schedule to the Supreme Court of Judicature Act, 1875, or other similar forms, are applicable (except as after provided in actions for injunctions);

In claims for * money, † damages, or ‡ liquidated demands.

Except where injunction sought.

In all causes and matters by the 34th section of the Supreme Court of Judicature Act, 1873, assigned to the Queen's Bench Division of the Court;

In all causes and matters by the 34th section of the said Act assigned to the Common Pleas Division of the Court;

In all causes and matters by the 34th section of the said Act assigned to the Exchequer Division of the Court;

In all causes and matters by the 34th section of the said Act assigned to the Probate, Divorce, and Admiralty Division of the Court;

In chancery actions.

And also in causes and matters by the 34th section of the said Act assigned to the Chancery Division of the Court in the following cases (that is to say):—

For administration of estate under 1000*l.*

1. By creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next-of-kin, in which the personal or real or personal and real estate for or against or in respect of which or for an account or administration of which the demand may be made shall be under the amount or value of 1000*l.* (*q*).

For execution of trusts of estate under 1000*l.*

2. For the execution of trusts or appointment of new trustees in which the trust estate or fund shall be under the amount or value of 1000*l.*

For partnerships or other accounts where assets are under 1000*l.*

3. For dissolution of partnership or the taking of partnership or any other accounts in which the partnership assets, or the estate or fund shall be under the amount or value of 1000*l.*

Additional Order VI. August, 1875.

For foreclosure or redemption where mortgage or charge is under 1000*l.*

For specific performance where consideration is under 1000*l.*

In proceedings under Trustee Relief or Trustee Acts where trust funds are under 1000*l.*

In infancy proceedings where property is under 1000*l.*

In special cases and proceedings under statutory jurisdiction where fund is under 1000*l.*

4. For foreclosure or redemption, or for enforcing any charge or lien in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of 1000*l.*

5. And for specific performance in which the purchase-money or consideration shall be under the amount or value of 1000*l.*

6. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of 1000*l.*

7. In all proceedings relating to the guardianship or maintenance of infants in which the property of the infant shall be under the amount or value of 1000*l.*

8. In all proceedings by original special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1000*l.*

Higher scale in cases of fraud, &c.

1000*l.* how reckoned.

(*p*) The lower scale does not apply to suits involving such questions as equitable fraud. See *Earl of Stamford* v. *Dawson*, 15 W. R. 396 ; *Grimes* v. *Harrison*, 27 Beav. 198 ; *Flockton* v. *Peake*, 12 W. R. 1025.

(*q*) In estimating the 1000*l.* the Court looks to the amount in dispute when the bill is filed, not to the amount recovered, *Flockton* v. *Peake*, 12 W. R. 1025 ; *Re Reece*, L. R. 2 Eq. 609 ; *Cotterell* v. *Stratton*, L. R. 9 Ch. 514 ; but when an estate, originally large, has been reduced by proper payments to below 1000*l.* before the suit was instituted, the lower scale applies, *ibid.* ; and see *Judd* v. *Plum*, 29 Beav. 21 ; *secus*, if the bill seek other relief, although the fund in question is under 1000*l.*, *Grimes* v. *Harrison*, 27 Beav. 198.

In an interpleader suit before V.-C. Kindersley (*Gibbs* v. *Gibbs*, 6 W. R. 415), where there was an actual fund under 1000*l.* to be dealt with, it was held that the lower scale applied.

Higher scale in other cases, and where an injunction is the principal relief sought to be obtained.

2. Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "Higher Scale" in the schedule hereto : In all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property and

infringement of rights, easements, patents and copyrights (*r*), and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed "Lower Scale" are hereby made applicable.

Additional Order VI. August, 1875.

(*r*) See *Reade* v. *Bentley*, 3 K. & J. 271.

3. Notwithstanding these rules, the Court or judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs.

Discretion of judge.

4. The provisions of Order LXIII. in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to these rules.

Interpretation of terms.

SCHEDULE OF COSTS OF PROCEEDINGS.

[See this schedule, printed in Appendix, p. XVIII., *post.*]

ADDITIONAL RULES, AUGUST, 1875.

VII. Special allowances and general provisions.

Special Allowances and General Provisions.

1. As to writs of summons requiring special indorsement, original special cases, pleadings and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour and expenses in or about the preparation of such documents as in his discretion he may think proper.

Taxing officer's discretion to allow other charges than those in schedule in certain cases.

2. As to drawing any pleading or other document the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle.

Fees to include copy made for settling draft.

3. As to instructions to sue or defend, when the higher scale is applicable: if in consequence of the instructions

Fee for taking instructions.

Additional Rules (Special Allowances), August, 1875.

being taken separately from more than three persons (not being co-partners) the taxing officer shall consider the fee above provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

Fee for taking affidavits from several deponents or at a distance.

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

To include attendances on deponent.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over.

Where same solicitor is for both parties no fee for delivering notices, &c.;

6. As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties (*a*), unless it be necessary for the purpose of making an affidavit of service.

(*a*) See cases cited in note (*c*).

nor for perusals.

7. As to perusals the fees are not to apply where the same solicitor is for both parties (*b*).

(*b*) As to where the same solicitor is for two or more defendants, see note (*g*) to Ord. XII. r. 7, p. 463, *ante*.

Charges for procuring evidence.

8. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed (*c*).

Of examining witnesses abroad, or unnecessarily. Of affidavits, &c., not used.

(*c*) As to costs of examining witnesses abroad, see *Wentworth* v. *Lloyd*, 34 Beav. 455; of unnecessary evidence, see *Attorney-General* v. *Carrington*, 6 Beav. 460; *Booth* v. *Booth*, 1 Beav. 130; *Farrow* v. *Rees*, 4 Beav. 29. Of bringing up witnesses for cross-examination who were not cross-examined, *Clark* v. *Malpas*, 31 Beav. 554.

The costs of an affidavit, filed but not entered in the order, will not be allowed even on a taxation as between solicitor and client (*Stephens* v. *Lord Newborough*, 11 Beav. 403; and see *Stuart* v. *Greenall*, 13 Price, 755). But where a document is not filed, but it appears that the consequence of not filing it was to save expense, the costs of it will be allowed (*Davies* v. *Marshall* (No. 2), 1 Drew. & Sm. 564).

A solicitor is entitled to the costs of an affidavit made on delivering up papers under an order (*Re Catlin*, 18 Beav. 514; see *Rawlinson* v. *Moss*, 9 W. R. 733).

As to costs of employing experts to get up evidence, see *Churton* v. *Frewin*, 15 W. R. 599; *Smith* v. *Buller*, L. R. 19 Eq. 473. And as to models in a patent suit, see *Batley* v. *Kynock*, L. R. 20 Eq. 632.

As to costs of attorney's travelling expenses, see *Clark* v. *Malpas*, 31 Beav. 554 ; *Howell* v. *Tyler*, 2 Y. & C. 284. Additional Rules (Special Allowances), August, 1875.

The costs of shorthand writer's notes of the evidence were disallowed in *Smith* v. *Earl of Effingham*, 10 Beav. 378 ; *Flockton* v. *Peake*, 12 W. R. 1023 ; but allowed in *Clark* v. *Malpas*, 31 Beav. 554, where the taxation was between party and party, but allowed in *Re London and Birmingham Railway Company*, 6 W. R. 141 ; *Malins* v. *Price*, 1 Ph. 590. Shorthand writer.

The costs of an interpreter employed to prepare an answer were allowed, but not his hotel and travelling expenses, *Earl Shrewsbury* v. *Trappes*, 10 W. R. 663. Interpreter.

A reasonable sum was allowed to a solicitor for reading depositions taken abroad, *Wentworth* v. *Lloyd*, L. R. 2 Eq. 607. Abstracting depositions.

The costs of taking depositions which became useless were disallowed, *Ridley* v. *Sutton*, 1 H. & C. 741 ; but see *Duke of Beaufort* v. *Lord Ashburnham*, 13 C. B. N. S. 598.

9. As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper. Special allowance for agency correspondence.

10. As to attendances at the judge's chambers, where, from the length of the attendance or from the difficulty of the case, the judge or master shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the judge or master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge or master may allow such fee in lieu of the fee of 1*l.* 1*s.* above* provided, not exceeding 2*l.* 2*s.*, or where the higher scale is applicable 3*l.* 3*s.*, or in proceedings to wind-up a company 5*l.* 5*s.*, as in his discretion he may think fit ; and where the preparation of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding ten guineas, as in Special allowance for preparation of case at chambers. * Appendix p. xx. *post.* Judge's memorandum.

Additional Rules (Special Allowances), August, 1875.

his discretion he may think fit, instead of the above fees of 2*l.* 2*s.*, 3*l.* 3*s.*, and 5*l.* 5*s.*

Costs of adjournment in chambers by reason of default in appearance.

11. As to attendances at the judges' chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed ex parte) or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending, by the party so absent or neglectful, or by his solicitor personally; and the party so absent, or neglectful, is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested (*d*).

Cons. Ord. XL. r. 31.

(*d*) This rule is from Cons. Ord. XL. r. 31.

Folio to be seventy-two words.

12. A folio is to comprise seventy-two words, every figure comprised in a column being counted as one word.

Fees to counsel.

13. Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter, as the taxing officer shall, in his discretion, think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits (*e*), as the taxing officer shall, in his discretion, think proper to be settled by counsel, are to be allowed; but as to affidavits, a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

Not for each separate affidavit.

Cons. Ord. XL. r. 17.

(*e*) This rule supersedes Cons. Ord. XL. r. 17; the fees for counsel settling affidavits are generally allowed, see *Davies* v. *Marshall* (No. 2), 1 Dr. & Sm. 564.

Fees to counsel.

Fees to counsel are generally left to the taxing-master's discretion, *Attorney-General* v. *Lord Carrington*, 6 Beav. 454; *Parkinson* v. *Hanbury*, 13 W. R. 1056; *Smith* v. *Daniell*, 34 L. T. N. S. 899; including the conveyancing counsel of the court, *Re Spooner*, 1 K. & J. 220; but see *Attorney-General* v. *Drapers' Company*, 4 Beav. 305; *Davis* v. *Earl Dysart*, 21 Beav. 124; 8 D. M. G. 33; *Sturgis* v. *More*, 33 L. T. 5.

Retaining fees.

A special retaining fee was disallowed on taxation between party and party, *Smith* v. *Earl of Effingham*, 10 Beav. 378; *Green* v. *Briggs*, 7 Hare, 279; but see *contra*, *Nicholls* v. *Haslam*, 15 Sim. 49. Counsel's fees on a brief to fix a day for the hearing were allowed on taxation between party and party, *Clark* v. *Malpas*, 31 Beav. 554.

Drawing observations.

The costs of drawing observations for counsel may be allowed, though the cause stand over, *Davies* v. *Marshall* (No. 2), 1 Dr. & Sm. 564, unless

they are unreasonably long, *Ernest* v. *Partridge*, 11 W. R. 715; see *Wentworth* v. *Lloyd*, 3 L. R. Eq. 608; and *Friend* v. *Solly*, 10 Beav. 329; *Re Pender, ibid.*, 390; *Stephens* v. *Lord Newborough*, 11 Beav. 403, which were cases where the briefs became useless owing to a compromise.

Of consultations.

In the absence of special reason only one consultation fee should be allowed on taxation as between party and party, *Smith* v. *Earl of Effingham*, 10 Beav. 378; and see *Davis* v. *Earl of Dysart*, 21 Beav. 124; 8 D. M. G. 33; *Lucas* v. *Peacock*, 8 Beav. 1; *Re Catlin*, 18 Beav. 516. As to costs of both London and country attorney attending, see *Bell* v. *Aitkin*, L. R. 3 C. P. 321.

The costs of a conference as to a demurrer were allowed though the demurrer was unsuccessful, *Ernest* v. *Partridge*, 11 W. R. 715; and of more than one conference, *Re Braund*, 39 L. J. Ch. 384.

Conferences.

See as to allowance of consultation fees on taxation between party and party, *Green* v. *Briggs*, 7 Hare, 279; *Forster* v. *Davies*, 32 Beav. 624.

Cons. Ord. XL. r. 20.

See further as to fees to counsel, Cons. Ord. XL. r. 20, which provided as follows:—

Fees to two or more counsel.

Where two counsel appear for the same party upon the hearing of any cause or matter, and it appears to the taxing-master to have been necessary or proper for such party to retain two counsel to appear, the costs occasioned thereby shall be allowed, although both of such counsel may have been selected from the outer bar.

Costs of second counsel.

As to the practice of allowing two counsel upon interlocutory motions, see observations of V.-C. Shadwell in *Cooke* v. *Turner*, 12 Sim. 650, and of Lord Langdale in *Stephens* v. *Lord Newborough*, 11 Beav. 403, where the briefs of two counsel were allowed on an unopposed motion on taxation as between party and party. So on an unopposed petition, *Sturge* v. *Dimsdale*, 9 Beav. 170. But of course there were special circumstances in those cases. See *Friend* v. *Solly*, 10 Beav. 329; *Yearsley* v. *Yearsley*, 19 Beav. 1; *Ex parte Musgrave*, 17 L. T. N. S. 314.

The costs of two junior counsel employed to settle a defendant's answer will not be allowed (*Davis* v. *Earl of Dysart*, 21 Beav. 124; 8 D. M. G. 33); but under an order for taxation of costs as between *solicitor and client*, the costs of a consultation between the junior counsel and a Queen's Counsel as to the frame of a bill in equity were properly allowed, without reference to the result of the suit, or the fact whether or not the advice of the Queen's Counsel was acted upon (*Forster* v. *Davies*, 11 W. R. 813; see, too, *Lucas* v. *Peacock*, 8 Beav. 1). The costs of a second counsel attending the examination of witnesses before an examiner were refused in *Hallows* v. *Fernie*, 16 W. R. 175.

Costs of third counsel.

It does not follow from this rule that the costs of a third counsel (being a Queen's Counsel) will not be allowed where the question involved is intricate or the pleadings voluminous, *Wastell* v. *Leslie*, 14 Sim. 84. In *Smith* v. *Earl of Effingham*, 10 Beav. 378; *Attorney-General* v. *Munro*, 1 Mac. & G. 213; *Underwood* v. *Secretary of State in Council*, W. N. (1868) 136, the costs of a third counsel were not allowed on taxation; but in *Smith* v. *Buller*, L. R. 19 Eq. 473; and in *Re Charles Laffitte & Co.*, L. R. 20 Eq. 650, *Downing College Case*, 3 M. & C. 474, the costs of three counsel but not more were allowed (*Pearse* v. *Lindsay*, Johns. 705, note; 1 D. F. J. 573); *Wentworth* v. *Lloyd*, 2 L. R. Eq. 607. See, as to employing a third counsel of the common law bar, *Betts* v. *Clifford*, 1 J. & H. 74, where the costs of such counsel were allowed; *Flockton* v. *Peake*, 12 W. R. 1203, where they were disallowed.

When the counsel who has drawn the pleadings is called within the bar before the hearing, the costs of employing additional counsel may be allowed

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(*Carter* v. *Barnard*, 16 Sim. 157; see *Green* v. *Briggs*, 7 Hare, 279); *Horsley* v. *Cox*, L. R. 7 Eq. 464; *Cousens* v. *Cousens*, L. R. 7 Ch. 48; *Betts* v. *Cleaver*, L. R. 7 Ch. 513.

As to the costs of a brief to the Attorney-General on an information, see *Attorney-General* v. *Drapers' Company*, 4 Beav. 305; and as to refreshers to counsel, see *Smith* v. *Daniell*, 34 L. T. 899.

Brief to Attorney-General.

Counsel in chambers.

14. As to counsel attending at judges' chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend (*f*).

(*f*) This rule is from Cons. Ord. XL. r. 29.

Allowance for inspection of documents.

15. As to inspection of documents, under Order XXXI. rule 14, no allowance is to be made for any notice or inspection, unless it is shown, to the satisfaction of the taxing officer, that there were good and sufficient reasons for giving such notice and making such inspection.

Fees for taking copies of or extracts from documents.

16. As to taking copies of documents in possession of another party or extracts therefrom (*g*), under rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract, as he may, by writing, require, at the rate of 4d. per folio; and if the solicitor of the party producing the document refuses, or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

(*g*) When documents were produced at the office of a solicitor for his convenience, he was only allowed stationers' charges for taking copies (*Kennedy* v. *George*, 6 W. R. 218).

Fee for service of petition.

17. Where a petition in any cause or matter, assigned to the Chancery Division, is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be 2*l.* 2s. The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to

costs where no such tender is made, or where the Court or judge shall consider the party entitled notwithstanding such notice or tender to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon, he is to be allowed a fee not exceeding 2*l.* 2s.

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For perusing petition.

18. The Court or judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in Court or at chambers (*h*), and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before and dealt with by the Court or judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so.

Costs of unnecessary matters in pleading.

Evidence though entered as read.

(*h*) See r. 20, *infra*, as to the chief clerk's note of such disallowance. This rule is identical with Cons. Ord. XL. rr. 9, 10.

Cons. Ord. XL. rr. 9, 10.

19. In any case in which, under the preceding rule No. 18, or any other rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or

Set off of costs.

Additional Rules (Special Allowances), August, 1875.

certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

Costs of unnecessary length in chambers.

20. Where in the Chancery Division any question as to any costs is under the preceding rule 18 dealt with at chambers, the chief clerk is to make a note thereof, and state the same on his allowance of the fees for attendance at chambers, or otherwise as may be convenient for the information of the taxing officer.

Costs of improper appearance in chambers.

21. Where any party appears upon any application or proceeding in Court or at chambers, in which he is not interested or upon which, according to the practice of the Court he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or judge shall expressly direct such costs to be allowed (*i*).

(*i*) See note (*r*), p. 142, *ante*. Cons. Ord. XL. r. 32, contained the same provision.

Costs of applications to extend time.

22. As to applications to extend the time for taking any proceeding limited by rules of Court (subject to any special order as to the costs of, and occasioned by, any such application), the costs of one application are, without special order, to be allowed as costs in the cause or matter, but (unless specially ordered) no costs are to be allowed of any further application to the party making the same as against any other party, or any estate or fund in which any other party is interested.

Powers of taxing-masters.

23. The taxing officers of the Supreme Court, or of any division thereof, shall, for the purpose of any proceeding before them, have power and authority to adminster oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing-masters, registrars, or other officers of any of the Courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as, previous to the commencement of the Act, were vested in any of such officers (*k*), including examining witnesses, directing production of books, papers, and docu-

Examination of witnesses, directing

ments, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor (*l*), and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a judge (*m*).

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production, making certificates, requiring party to be represented by solicitor.

(*k*) This rule is substantially identical with Cons. Ord. XL. r. 1. As to the taxing-master's powers generally, see *Clayton* v. *Meadows*, 2 Hare, 32; *Re Atkinson*, 26 Beav. 51; 33 & 34 Vict. c. 28.

Cons. Ord. XL. r. 1. Taxing-master's powers.

In *Graham* v. *Wickham*, 13 W. R. 396, it was held that the taxing-master might allow executors their costs of litigation, though no direction was given in the suits in which such costs were incurred that they should be so allowed.

His province generally is to deal only with ordinary costs: any extraordinary question must come before the judge in chambers, see *Turner* v. *Turner*, 7 W. R. 573; *King* v. *Savery*, 8 D. M. G. 311; *Re Catlin*, 18 Beav. 511. Compare 15 & 16 Vict. c. 80, s. 27, and note, p. 125, *ante*.

Costs.

(*l*) It is in the discretion of the taxing-master to determine who are the proper parties to attend the taxation, and where he had excluded a party on the ground of want of a separate interest, the Court would not disturb the decision (*Stahlschmidt* v. *Lett*, 9 W. R. 830. Compare note (*w*), p. 144, *ante*, as to separate appearances.

(*m*) It was further provided by Cons. Ord. XL. rr. 2, 3, 38—40, as follows:—

Cons. Ord. XL. rr. 2, 3, 38–40.

Rule 2. Taxing-masters.

2. *All references for the taxation of costs shall be made to the taxing-master in rotation; or if there shall have been any former taxation of costs in the same cause or matter, then to the taxing-master before whom such former taxation shall have taken place.*

Rule 3. Taxing-masters to assist each other.

3. *The taxing-masters shall be respectively assistant to each other; and in the discharge of their duties, and for the better despatch of the business of their respective offices, any taxing-master may tax or assist in the taxation of a bill of costs which has been referred to any other taxing-master for taxation and for ascertaining what is due in respect of such costs, and in such case shall certify accordingly.*

Rule 38. Order for taxation when unnecessary.

38. *Where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order ordered or decreed to be paid, the taxing-master in rotation, or if there has been any former taxation of costs in the same cause or matter,*

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then the taxing-master before whom such former taxation has taken place, may tax such costs without any order referring the same for taxation, unless the Court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs; and the costs to be certified by the taxing-master shall be recoverable by subpœna.

Costs recoverable by subpœna.

Rule 39. Taxation of costs where parties differ.

39. *Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the taxing-master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or before the expiration of the eight days, or such further time as the taxing-master shall in his discretion allow, such other party shall either agree to pay the costs or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs. But where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing-master shall proceed to tax the costs. And where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs.*

Rule 40. Total amount of costs taxed to be stated.

40. *Where any costs are by any decree or order directed to be taxed, and to be paid out of any money in Court, the taxing-master in his certificate of taxation shall state the total amount of all such costs as taxed, without any direction for that purpose in such decree or order.*

Discretion of taxing officer as to costs of appearances before him.

24. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall, in his discretion, consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

Default in bringing in

25. When any party entitled to costs refuses or neglects

to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

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costs for taxation.

26. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party (*n*).

Costs as between party and party.

(*n*) This rule is from Cons. Ord. XL. r. 32, but is more general.

Cons. Ord. XL. r. 32.

27. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

Fees for work not provided for.

28. The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act, and the rules of Court in pursuance thereof remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

Application of former practice.

29. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel (*o*), if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the

Discretionary fees to counsel, &c.

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amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

(*o*) See r. 13, *supra*, as to fees to counsel.

Application for reviewal of taxation.

30. Any party who may be dissatisfied with the allowance or disallowance, by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer an objection in writing, to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same (*p*).

Cons. Ord. XL. r. 33.

(*p*) This rule is taken from Cons. Ord. XL. r. 33.

Reviewal upon objections.

31. Upon such application, the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto (*q*).

Cons. Ord. XL. r. 34.

(*q*) This rule is taken from Cons. Ord. XL. r. 34.

Application to judge at chambers to review taxation.

32. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to, as aforesaid, may apply to a judge at chambers (*r*) for an order to review the taxation (*s*) as to the same item or part of an item, and the judge may thereupon make such order as to the judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive, as to all matters which shall not have been objected to in manner aforesaid.

(*r*) This application was directed to be made in chambers by r. 3 of an order of April 17, 1867, p. 20, *ante*.

(*s*) Questions of taxation specially left to the taxing-master's discretion are not subject to reviewal, see *Re Sheffield Waterworks Act*, L. R. 1 Ex. 54 ; *Re Owen and L. & N. W. Ry.*, L. R. 3 Q. B. 54 ; *Potter* v. *Rankin*, L. R. 4 C. P. 76.

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A retaxation will in no case be directed if the items alleged to be overcharged do not amount to forty shillings, *Newton* v. *Boodle*, 4 C. B. 359 ; and on an application to review, the amount must be stated, *Re Dearden*, 9 Exch. 210 ; and the items alleged to have been improperly allowed or disallowed must be specified, *Re Congreve*, 4 Beav. 87.

Ord. April. 17, 1867, r. 3.

The Court, on application to review, will determine questions which involve some principle, but not those relating to *quantum* only, *Re Catlin*, 18 Beav. 508 ; *Friend* v. *Solly*, 10 Beav. 529 ; *Re Congreve*, 4 Beav. 87 ; *Turner* v. *Turner*, 7 W. R. 573 ; *Re Hubbard*, 23 Beav. 481 ; *Att.-Gen.* v. *Lord Carrington*, 6 Beav. 454 ; *Alsop* v. *Lord Oxford*, 1 M. & K. 564 ; *Att.-Gen.* v. *Drapers' Company*, L. R. 9 Eq. 69. Thus, where there had been irregularity in the proceedings before the taxing-master, *Fenton* v. *Crickett*, 3 Madd. 496 ; or where costs had been wrongly omitted taxation (*Greenwood* v. *Churchill*, 14 Beav. 160), or the master refused to allow any costs in respect of a particular proceeding (*Heming* v. *Leifchild*, 9 W. R. 174), the taxation was ordered to be reviewed.

No reviewal of questions left to taxing-master's discretion.

Or under forty shillings.

Questions of principle.

Where the petitioner had not taken proper steps to satisfy the taxing-master, he had to pay the costs of an application to review, though successful, *Sturge* v. *Dimsdale*, 9 Beav. 170. Where the taxation was only ordered to be reviewed in part, no costs were given, *Re Catlin*, 18 Beav. 508. See, too, *Re Whalley*, 20 Beav. 578 ; *Re Colquhoun, ex parte Ford*, 1 Sm. & Giff. App. l. ; *Re London, Birmingham, and Bucks Railway Act*, 6 W. R. 141.

Costs of reviewal.

33. Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct.

Evidence before judge.

34. When a writ of summons for the commencement of an action shall be issued from a district, and when an action proceeds in a district registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued in London, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the district registry.

Fees in district registry actions.

Rules of Dec. 1, 1875.

RULES OF DECEMBER 1, 1875.

At a meeting of the judges of the Supreme Court, held on December 1, 1875, in pursuance of "The Judicature Act, 1875," the following new rules of Court and alterations of existing rules of Court were unanimously agreed to :—

Citation of rules.

1. The rules in the first schedule to the Supreme Court of Judicature Act, 1875, may be cited as "The Rules of the Supreme Court," and the additional rules of Court made by Order in Council on August 12, 1875, may be cited as "The Rules of the Supreme Court (Costs)," and these rules may be cited as "The Rules of the Supreme Court, December, 1875," or each separate one of these rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the order and rule mentioned in the margin.

Admiralty forms.

[2, 3, 4, 5, 6, 8, 10 related only to Admiralty writs and actions.]

Ord. XIII. r. 5A.

Rule 7 (default of appearance) is printed as Ord. XIII. r. 5A, p. 470, *ante*.

Ord. XXIII. r. 2.

Rule 9 (withdrawal of causes by consent) is printed as Ord. XXIII. r. 2, p. 500, *ante*.

Ord. XXXV. r. 15.

Rule 11 (district registrars) is printed as Ord. XXXV. r. 15, p. 538, *ante*.

Ord. XXXVI. r. 8.

Rule 12 amended Ord. XXXVI. r. 8, for which see p. 544, *ante*.

Ord. XXXVI. r. 10A.

Rule 13 (notice of trial) is printed as Ord. XXXVI. r. 10A, p. 544, *ante*.

Ord. XXXVI. r. 17.

Rule 14 amended Ord. XXXVI. r. 17, for which see p. 545, *ante*.

Ord. LXI. r. 4A.

Rule 15 (offices of district registrars) is printed as Ord. LXI. r. 4A, p. 619, *ante*.

Ord. LVIII. r. 19.

Rule 16 (appeals from inferior courts) is printed as Ord. LVIII. r. 19, p. 617, *ante*.

ORDER OF 1 FEB. 1876.

Order of Feb., 1876.

[This order provides for the fees to be taken by the official referees (see p. 550, *ante*)].

RULES OF FEBRUARY, 1876.

At a meeting of the judges of the Supreme Court, held on the 23rd of February, 1876, in pursuance of the Judicature Act, 1875, the following new rules of Court and alterations of existing rules of Court were unanimously agreed to, and ordered to be in force on and after the 3rd day of March, 1876 :—

1. These rules may be cited as "The Rules of the Supreme Court, February, 1876," or each separate one of these rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the order and rule mentioned in the margin. Citation.

Rule 2 (indorsement of address) is printed as Ord. IV. r. 2A, p. 438, *ante*. Ord. IV. r. 2A.

Rule 3 (indorsement of address) is printed as Ord. IV. r. 3, p. 438, *ante*. Ord. IV. r. 3.

[Rule 3 relates to Admiralty actions only; see p. 448, *ante*.] Ord. V. r. 11.

Rule 5 (appearance) is printed as Ord. XII. r. 6, p. 463, *ante*. Ord. XII. r. 6.

Rule 6 (amendment of writ of summons) is printed as Ord. XXVII. r. 1, p. 502, *ante*. Ord. XXVII. r. 1.

Rule 7 (security for costs) is printed as Ord. LV. r. 2, 603, *ante*. Ord. LV.

[Rule 8 (see p. 608, *ante*) relates only to Admiralty actions.] Ord. LVII. r. 7.

Rule 9 (closing of offices) is printed as Ord. LXI. r. 4A, p. 619, *ante*. Ord. LXI. r. 4A.

Rule 10 (sitting of official referees) is printed as Ord. XLI. r. 10, p. 620, *ante*. Ord. XLI. r. 10.

Rules of June, 1876.

RULES OF JUNE, 1876.

At a meeting of the judges of the Supreme Court held on the 26th of June, 1876, in pursuance of "The Judicature Act, 1875," the following new rules of Court and alterations of existing rules of Court were unanimously agreed to, and ordered to be in force on and after the 17th day of July, 1876.

Citation.

1. These rules may be cited as "The Rules of the Supreme Court, June, 1876," or each separate one of these rules may be cited as if it had been one of "The Rules of the Supreme Court," and had been numbered by the number of the order and rule mentioned in the margin.

Ord. II. r. 3A. Rule 2 (writ of summons and procedure) alters forms 2 and 3 in Appendix of Forms (Appendix, Pt. II., *post*).

Ord. V. r. 8. Rule 3 (issue of writs of summons) alters Ord. V. r. 8 (see p. 447, *ante*).

Ord. IX. r. 6A. Rule 4 (service of writ of summons) is printed as Ord. IX. r. 6A, p. 455, *ante*.

Ord. XI. r. 1A. Rule 5 (service out of the jurisdiction) is printed as Ord. XI. r. 1A, p. 459, *ante*.

Ord. XII. r. 12A. Rule 6 (appearance) is printed as Ord. XII. r. 12A, p. 465, *ante*.

Ord. XVI. r. 9A. Rule 7 (parties) is printed as Ord. XVI. r. 9A, p. 478, *ante*.

Ord. XVI. r. 10. Rule 8 is printed as Ord. XVI. r. 10A, p. 479, *ante*.

Ord. XIX. r. 5. Rule 9 (pleading) altered Ord. XIX. r. 5 (see p. 489, *ante*).

Ord. XXIII. r. 2.* Rule 10 (discontinuance) is printed as Ord. XXIII. r. 2*, p. 500, *ante*.

Ord. XXXI. r. 7. Rule 11 (discovery and inspection) amended Ord. XXXI. r. 7, p. 516, *ante*.

Ord. XXXV. r. 1. Rule 12 (proceedings in district registries) is printed as Ord. XXXV. r. 1, p. 535, *ante*.

Rules of June, 1876.

Rule 13 (trial) is printed as Ord. XXXVI. r. 4A, p. 543, *ante*. Ord. XXXVI. r. 4A.

Rules 14–16 (official referees) are printed as Ord. XXXVI. rr. 29A, 29B, 29C, p. 548, *ante*. Ord. XXXVI. rr. 29A, 29B, 29C.

Rule 17 (execution) is printed as Ord. XLII. r. 10, p. 573, *ante*. Ord. XLII. r. 10.

Rule 18 (transfers and consolidation) is printed as Ord. XLI. r. 2A, p. 592, *ante*. Ord XLI r. 2A.

Rule 19 (applications at chambers) amended r. 2 of Ord. LIV., p. 602, *ante*. Ord. LIV. r. 2A.

Rule 20 (costs) amended the schedule to "The Rules of the Supreme Court (Costs)." See Appendix, p. XX. Schedule as to costs.

Order as to Court Fees.

ORDER AS TO COURT FEES, OCTOBER 28, 1875.

Court fees to be taken by stamps.

* Appendix, p. xxv., *post.*

1. The fees and percentages contained in the schedule hereto* are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any Court to be created by any commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those Courts or the Supreme Court, or any judge of those Courts, or any of them; and the said fees and percentages shall be taken by stamps (*a*), except those taken in the district registries, which shall, until further order, be taken in money, and applied and accounted for in such manner as the treasury may from time to time direct.

Fees of taxation.

(*a*) The fees of taxation of costs which are directed to be paid out of a fund in Court are not to be collected by stamps, but in manner provided by the Chancery Funds Rules, 1874, p. 415, *ante.*

Treasury order as to stamps.

A Treasury order as to the use of stamps in other cases, issued contemporaneously with the order in the text, provided as follows :—

Rules 1-3. Temporary provisions.

[Rules 1—3, and the latter part of r. 4, continued temporarily, the provisions then in force, see Treasury Order, April 22, 1876, *infra.*]

Rule 4. Stamps to be appropriated by the words "Judicature fees."

4. "That for such documents in the Chancery, the Queen's Bench, the "Common Pleas, and the Exchequer Divisions of the Supreme Court of "Judicature as may be, under any existing rule or order, stamped with an "adhesive stamp or stamps, adhesive stamps appropriated by the words "'Judicature Fees' shall be used."

Rule 5. Where no other document, stamps to be affixed to præcipe.

5. "And that where any of such fees are payable in respect of any "matter or thing to be done by any officer or in any office whatever of the "Supreme Court of Judicature, and it shall not have been customary or "may not be necessary to use any written or printed document or paper in "reference to such matter or thing whereon the stamp could be stamped or "affixed, the party or his solicitor requiring such matter or thing to be "done, shall make application for the same by a præcipe, or short note in "writing or print, and a stamp denoting the amount of the fees so payable "shall be stamped or affixed to such præcipe or note."

Rule 6. Officer to decide what document shall be stamped.

6. "That where a fee is payable, but no directions are found in previous "orders as to the document to which the stamp is to be applied, it shall be "lawful, until we do otherwise order, for any officer of the Supreme Court "whose duty it would be to see that the fee in question is duly paid by "means of a stamp, to decide on what document such stamp shall be "impressed or affixed."

Another Treasury Order, issued April 22, 1876, provided :— Order as to Court Fees.

1. "That from and after April 25, 1876, the stamps used for denoting "the said fees and percentages shall be of the character, and be applied and "otherwise dealt with, as prescribed by a schedule thereto." Treasury order, April, 1876.

2. "That the adhesive stamps then in use shall continue to be used so "long as they are supplied by the Commissioners of Inland Revenue."

3. "That in any case in which a deposit on account of probable "fees and expenses is required, the following regulations shall be "observed :— What stamps to be used.

(*a*) "The party, or his solicitor, from whom under any order as to Court fees a deposit may be required, shall, before the matter or cause be proceeded with, present, for the signature of the officer of the Court requiring the deposit, a certificate, duly stamped, for the amount of such deposit. Forms of certificates provided by the Commissioners of Inland Revenue may be obtained at the Inland Revenue Office, Somerset House, or at such other places as the commissioners may appoint." Deposit on account of fees.

(*b*) "When the fees and expenses are ascertained, the said officer of the Court shall endorse upon the said certificate the amount thereof."

(*c*) "If the amount is in excess of the deposit, the certificate, bearing an additional stamp equal to the excess, must be produced to the said officer before he delivers his judgment or award, or gives his decision in the matter or cause."

(*d*) "If the amount of the fees and expenses is less than the deposit, the holder of the certificate may obtain repayment of the difference upon presenting the certificate so endorsed at the Inland Revenue Office, Somerset House."

2. The fees and percentages set forth in the column headed lower scale in the schedule hereto are to be taken and paid in all cases in which the lower scale of fees is to be charged and allowed to solicitors under the provisions of the Additional Rules of Court* under the Supreme Court of Judicature Act, 1875, issued by order in council, dated the 12th day of August, 1875, and the fees and percentages set forth in the column headed higher scale in the schedule hereto are to be taken and paid in all other cases. When to be on lower scale.

* See p. 627, *ante*.

3. In causes and matters by the 34th section of the Supreme Court of Judicature Act, 1873, assigned to the Chancery Division: In chancery cases solicitor to certify for lower scale.

The solicitor or party acting in person shall, on any proceeding in which he claims to pay fees according to the lower scale, file with the proper officer a certificate in the form hereunder set forth (*b*), of which certificate the officer is, at the request of any solicitor or any party acting in person in the cause or matter, to mark a copy without a fee.

Order as to Court Fees.

On production of such copy of the certificate all officers of the Court are to receive and file all proceedings in the cause or matter bearing stamps according to the lower scale.

In any case certified by the lower scale of Court fees, in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the higher scale of solicitors' fees, the deficiency in the fees of Court is to be made good.

Where lower or higher scale becomes applicable.

In any case in which the fees have been paid upon the higher scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the lower scale of solicitors' fees, the excess of fees so paid may be allowed upon the taxation of costs, if the circumstances of the case shall, in the judgment of the taxing officer, justify such allowance.

(*b*) The form is as follows :—

Form of Certificate for paying Lower Scale of Court Fees above referred to.

(Title of cause or matter.)

I hereby certify that to the best of my judgment and belief the Lower Scale of Fees of Court is applicable to this case.

Dated, &c.

A. B.,
Solicitor for plaintiff or defendant.

Saving clause as to Court fees.

[By r. 4 the provisions in this order are not to apply to the existing fees and percentages in respect of any of the jurisdiction which are not transferred to the High Court of Justice or the Court of Appeal by the Judicature Acts, or to the fees in respect of any matter at the time of the passing of the Judicature Act, 1875, within the jurisdiction of the Court of Probate, Divorce, or Admiralty Court, or relating to Bankruptcy Appeals, except so far as expressly varied ; or to fees in respect of criminal proceedings, or matters on the revenue side of the Exchequer Division, and in the office of the Queen's Remembrancer, or fees authorized to be taken by any sheriffs, or officers of sheriffs ; or to the fees directed to be taken or paid by any Act of Parliament, and in respect of which no fee or percentage is hereby provided ; or to fees due before the commencement of the Judicature Acts ; or to fees in respect of any proceedings pending at the commencement of the said Acts, and in respect of which no fee or percentage is hereby provided.]

Suitors in *formâ pauperis.*

5. The existing rules and practice, applicable to proceedings by persons suing *in formâ pauperis*, shall continue and be applicable to proceedings to which this order relates (*c*).

(*c*) It was provided by Cons. Ord. VII. rr. 8—11, that :—

Order as to Court Fees.

Cons. Ord. VII. rr. 8–11. Paupers.

No person shall be admitted to prosecute any suit in this Court in formâ pauperis, *without a certificate of counsel, that he conceives the case to be proper for relief in this Court.*

Rule 8. No person admitted to sue in *formâ pauperis* without certificate.

After an admittance to sue or defend in formâ pauperis, *no fee, profit, or reward, shall be taken of the pauper by any counsel or solicitor, for the despatch of the pauper's business during the time it shall depend in Court, and he shall continue* in formâ pauperis ; *nor shall any agreement be made for any recompense or reward afterwards. And any person offending herein shall be deemed guilty of a contempt of Court; and the party admitted, who shall give any such fee or reward or make any such agreement, shall be from thenceforth dispaupered and not be afterwards admitted again in that suit to sue or defend* in formâ pauperis.

Rule 9. Counsel or solicitor how remunerated.

The counsel or solicitor assigned by the Court to assist a person admitted in formâ pauperis, *either to sue or defend, may not refuse so to do, unless such counsel or solicitor satisfy the judge who granted the admittance with some good reason for his unwillingness to be so assigned.*

Rule 10. Counsel and solicitor assigned may not refuse without reason.

No process of contempt shall be issued at the instance of any person suing or defending in formâ pauperis, *until it be signed by his solicitor in the suit. And no notice of motion served or petition presented on behalf of any person admitted to sue or defend* in formâ pauperis (*except for the discharge of his solicitor*) *shall be of any effect, nor shall any person served with such notice or petition be bound to appear thereon, unless such notice or petition be signed by the solicitor of such person so suing or defending. And such solicitor shall take care that no such process be taken out, and that no such notice or petition be served, needlessly or for vexation but upon just and good grounds.*

Rule 11. Process of contempt at the suit of a pauper ; notices of motion or petitions on his behalf to be signed by his solicitor.

And Cons. Ord. XL. r. 5, provided that :—

Cons. Ord. XL. r. 5.

Where costs are ordered to be paid to a party suing

Rule 5. Party suing

Order as to Court Fees.

or defending in formâ pauperis, *such costs shall be taxed as* dives *costs, unless the Court shall otherwise direct.*

or defending in *formâ pauperis* to be paid dives costs.

See 11 Hen. 7, c. 12. Persons who can themselves (*Wilkinson* v. *Belcher*, 2 Bro. C. C. 272), swear that they are not worth 5*l.* in the world, their wearing apparel and the subject-matter of the suit excepted (*Allen* v. *McPherson*, 5 Beav. 469 ; and see *Davies* v. *Nixon*, 11 W. R. 62) may sue and defend *in formâ pauperis*, *Bird* v. *Bird*, 17 W. R. 155.

Suing in *formâ pauperis.*

The 5*l.* means 5*l.* available for the suit (*Dresser* v. *Morton*, 2 Ph. 286). Where a person's property was not worth 5*l.* independently of the *property the subject of the suit*, but he was in present possession of that property, he was dispaupered (*Spencer* v. *Bryant*, 11 Ves. 49 ; *Ridgway* v. *Edwards*, L. R. 9 Ch. 143 ; *Taprell* v. *Taylor*, 9 Beav. 493 ; *Butler* v. *Gardener*, 12 Beav. 525 ; and see *Burry Port Company* v. *Bowser*, 26 L. J. Ch. 319) ; so was an officer, though his half-pay was liable to be taken through his having passed through the Insolvent Court (*Boddington* v. *Woodley*, 5 Beav. 555) ; and a person who offered to redeem a mortgage (*Fowler* v. *Davies*, 16 Sim. 182) ; and it is not enough that he should swear that he has only 5*l.* "*after payment of his just debts*" (*Perry* v. *Walker*, 1 Coll. 229).

Affidavit.

Officer on half-pay.

Executor, &c.

An executor though without assets, cannot sue or defend in *formâ pauperis* (*Oldfield* v. *Cobbett*, 1 Ph. 613 ; *secus*, where he is also interested as legatee, *Bayly* v. *Bayly*, 11 Beav. 256 ; *Everson* v. *Matthews*, 3 W. R. 159 ; *Flattery* v. *Anderson*, 11 Ir. Eq. Rep. 586 ; *Parkinson* v. *Chambers*, 3 W. R. 34 ; *Martin* v. *Whitmore*, 17 W. R. 809 ; *Rogers* v. *Hooper*, 1 W. R. 474) ; and in general the same rule applies to all persons filling representative characters, *St. Victor* v. *Deverevx*, 6 Beav. 584, *Paradice* v. *Sheppard*, 1 Dick. 136.

Infants and married woman.

Infants may under special circumstances, it seems, sue by their next friends *in formâ pauperis*, *Lindsay* v. *Tyrrell*, 24 Beav. 124, 2 De G. & J. 7 ; and married women may be permitted to sue *in formâ pauperis* (*Dowden* v. *Hook*, 8 Beav. 399), without a next friend (*Page* v. *Page*, 1 W. R. 117 ; *Ex parte Hakewell*, 3 D. M. G. 116 ; *Re Foster*, 18 Beav. 525 ; *Re Lancaster*, 18 Jur. 229 ; *Wellesley* v. *Wellesley*, 16 Sim. 1 ; *Wellesley* v. *Mornington*, 18 Jur. 552 ; *Crouch* v. *Waller*, 4 De G. & J. 43 ; followed in *Re Barnes*, 10 W. R. 464 ; *Hinde* v. *Whitmore*, 2 K. & J. 458 ; where leave was given to a married woman to prosecute an appeal without a next friend, upon her affidavit that the next friend by whom she had prosecuted her suit in the court below refused to allow his name to be used any longer, and that she did not know any other person who would undertake the office). See further, as to next friends of married women and infants, *ante* p. 477.

Peeress.

A peeress was admitted to sue *in formâ pauperis* (*Wellesley* v. *Wellesley*, 16 Sim. 1).

Application *ex parte* but not of course.

The application to sue *in formâ pauperis* may be made *ex parte*, generally by petition, at the Rolls, and is not of course in all cases, *e.g.*, in the case of a married woman, who must show that she cannot find any substantial person to act as her next friend ; see *Coulsting* v. *Coulsting*, 8 Beav. 463. But a husband and wife may obtain an order of course to sue in respect of the wife's reversionary interest (*Pitt* v. *Pitt*, 1 W. R. 301) ; and see generally as to special applications, *St. Victor* v. *Devereux*, 6 Beav. 584.

Assigning solicitor and counsel.

Counsel and solicitor will not be assigned to a defendant under r. 10, upon the application of the plaintiff, *Garrod* v. *Holden*, 4 Beav. 245 ; see *Watkins* v. *Parker*, 3 M. & C. 370, after they have been assigned the pauper cannot be heard in person, *Parkinson* v. *Hanbury*, 4 D. M. G. 508.

Appeals and other proceedings in *formâ pauperis.*

A person may appeal *in formâ pauperis* (*Bland* v. *Lamb*, 2 Jack. & W. 402 ; *Crouch* v. *Waller*, 4 De G. & J. 43 ; *Fitton* v. *Macclesfield*, 1 Vern. 263 ; *Bradberry* v. *Brooke*, 4 W. R. 699 ; *Grimwood* v. *Shave*, 5 W. R. 482 ; *Phillips* v. *Phillips*, 8 Jur. N. S. 145 ; but see *Re Johnson*, 3 N. R. 655). When an order to sue *in formâ pauperis* had been made in the Court below, it was held unnecessary to obtain a fresh order to appeal *in formâ pauperis*, *Drennan* v. *Andrew*, L. R. 1 Ch. 300.

Order as to Court Fees.

So a person may be examined *pro interesse suo in formâ pauperis* (*James* v. *Dore*, 2 Dick. 728), or present a petition, *Re Money*, 13 Beav. 109 ; *Ex parte Hakewell*, 3 D. M. G. 116 ; or sue as a creditor of a joint-stock company being wound up (*Ex parte Fry*, 1 Drew. & Sm. 318).

When *pauper* pays costs.

A party suing *in formâ pauperis*, though unsuccessful, cannot be ordered to pay costs, unless he has been unsuccessful by his own default in proceeding ; thus a plaintiff suing *in formâ pauperis*, who amends by leaving out parties, must pay their costs, *Wilkinson* v. *Belcher*, 2 Bro. C. C. 272 ; and if he dismisses his own bill *ex parte*, he must generally pay costs, *Parkinson* v. *Hanbury*, 4 D. M. G. 508.

A person who during the pendency of a suit obtains an order to sue or defend *in formâ pauperis*, *may* be ordered to pay costs up to the date of the order, *Prince Albert* v. *Strange*, 13 Jur. 507 ; *Smith* v. *Pawson*, 2 De G. & Sm. 490.

Costs where order not served.

A party who has obtained the order to sue *in formâ pauperis*, must serve notice thereof on the other side, and if he omits such service, *malâ fide*, *i.e.*, with the intention of getting *dives* costs if he succeeds, but paying pauper costs if he fails, he will have to pay *dives* costs in respect of a step taken in the suit before such service, *Ballard* v. *Catling*, 2 Keen, 606 ; *Smith* v. *Pawson*, 2 De G. & Sm. 490.

A party may be dispaupered on becoming of ability to sue or defend himself,

If the order was obtained irregularly, and on suppression of a material circumstance, *Nowell* v. *Whittaker*, 6 Beav. 407 ; or if at any time pending the suit the party suing or defending *in formâ pauperis* becomes of ability to sue, or to defend himself, the Court will dispauper him (*Perry* v. *Walker*, 1 Coll. 229 ; and see cases in the reported note) ; but under certain circumstances he may be readmitted to sue or defend *in formâ pauperis*. The mere possession of property, however, is not sufficient, if it is wrongful (*Perry* v. *Walker*, 1 Y. & Coll. C. C. 676) ; nor will the circumstance of the pauper having sued another person at law not *in formâ pauperis* (*ibid.*), or the pauper being in regular employment (*ibid.*), be sufficient. If it is made to appear to the Court that the party was not in fact "a pauper" when he made his affidavit, the order will be discharged with costs (*Romilly* v. *Grint*, 2 Beav. 186 ; and see *Goldsmith* v. *Goldsmith*, 5 Hare, 123 ; *Mather* v. *Skelmerdine*, 7 Beav. 267) ; and a person may be dispaupered, though indebted and embarrassed, *Perry* v. *Walker*, 1 Coll. 229 ; *Romilly* v. *Grint*, *ubi sup.*

The circumstance of a subscription having been made to help the plaintiff in the suit, however objectionable on the ground of maintenance, is no ground for dispaupering (*Corbett* v. *Corbett*, 16 Ves. 409).

It is too late three years after the order, and after the defendants have answered, and the plaintiff has filed replication, to move to discharge for irregularity an order for the plaintiff to sue *in formâ pauperis* (*Parkinson* v. *Hanbury*, 4 D. M. G. 508 ; *St. Victor* v. *Devereux*, 6 Beav. 586).

or if he behaves vexatiously.

So, if a pauper behaves vexatiously in the conduct of the suit, he may be dispaupered, *Wagner* v. *Mears*, 3 Sim. 127 ; *Daintree* v. *Haynes*, 12 Jur. 594 ; *Perry* v. *Walker*, 1 Coll. 229 ; but vexatious conduct in a former suit, is no ground for dispaupering, *Corbett* v. *Corbett*, 16 Ves. 409.

A pauper solicitor may be ordered to pay personally the costs of irregular proceedings, *Brown* v. *Dawson*, 2 Hog. 76.

Abolition of other fees and percentages.

6. Save as otherwise provided by this order all existing fees and percentages which may be taken in any of the Courts whose jurisdiction is, by the Judicature Acts, 1873 and 1875, transferred to the High Court of Justice, or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer

Regulations as to Court Fees.

paid wholly or partly out of public moneys who is attached to any of those Courts, or the Supreme Court, or any judge of those Courts, or any of them, shall be and are hereby abolished.

Folio.

7. A folio is to comprise seventy-two words, every figure comprised in a column being counted as one word (*d*).

(*d*) See also Add. Rules, Aug. 1875 (Costs), r. 12, p. 632, *ante*.

Interpretation clause.

8. The provisions of Ord. LXIII. in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to this order.

9. This order shall come into operation at the time of the commencement of the Supreme Court of Judicature Acts, 1873 and 1875.

SCHEDULE OF COURT FEES TO BE TAKEN.

[See this schedule, Appendix, p. xix, *post*.]

APPENDIX.

—o—

FIRST APPENDIX. (FORMS).

SCHEDULE A.—PART I.

No. 1. Writ of summons.

187 . [*Here put the letter and number.*]

In the High Court of Justice.
[Chancery] Division.

Vice-Chancellor [ ] (*a*)

Between *A.B.* Plaintiff,
and
C.D. and *E.F.* Defendants.

Victoria, by the grace of God, *&c.*

To *C. D.* of , in the county of , and *E. F.* of

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of Our High Court of Justice in an action at the suit of *A.B.*; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, *&c.*

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor at the [ ] office at (*b*)

Writ of Summons.

Indorsements to be made on the writ before issue thereof.

The plaintiff's claim is for, *&c.*

This writ was issued by *E.F.*, of , solicitor for the said plaintiff, who resides at , *or*, this writ was issued by the plaintiff in person, who resides at [*mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any*].

Indorsement to be made on the writ after service thereof (*c*).

This writ was served by *X.Y.* on *L.M.* [the defendant *or* one of the defendants], on *Monday*, the day of , 18 .

(Signed) *X.Y.*

(*a*) In the Chancery Division the writ must be marked with the name of a judge, see Judicature Act, 1873, s. 42, Ord. V. r. 4.

(*b*) As to the place for appearance where the writ issues out of a district registry, see Ord. V. rr. 2, 3.

(*c*) This indorsement need not be made where the service has not been personal, *Dymond* v. *Croft* (on appeal), W. N. (1876) 208.

Notice in lieu of service.

No. 2.

Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction (Ord. II. r. 5).

2. Where writ to be served or notice to be given out of jurisdiction.

187 . [*Here put the letter and number.*]

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. and *E.F.* Defendants.

Victoria, by the grace of God, *&c.*

To *C.D.* of

We command you, *C.D.*, That within [*here insert the number of days directed by the Court or judge ordering the service or notice*] after the service of this writ [*or notice of this writ, as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of Our High Court of Justice in an action at the suit of *A.B.*; and take notice, that in default of your so doing the plaintiff may [by leave of the Court or a judge] * proceed therein, and judgment may be given in your absence.

Witness, *&c.*

Memoranda and Indorsements as in Form No. 1.

* These words are cancelled; rule 2 of June, 1876 (*ante*, p. 644).

Indorsement to be made on the writ before the issue thereof.

N.B.—*This writ is to used where the defendant or all the defendants or one or more defendant or defendants is or are out of the jurisdiction.*

Notice in lieu of service.

No. 3.

3. Notice in lieu of service.

Notice of Writ in lieu of service to be given out of the jurisdiction (Ord. II. r. 5).

187 . [*Here put the letter and number.*]

Between *A.B.* Plaintiff,
and
C.D., *E.F.*, and *G.H.* Defendants.

To *G.H.* of

Take notice, that *A.B.*, of has commenced an action against you, *G.H.*, in the Division of Her Majesty's High Court of Justice in England, by writ of that Court, dated the day of , A.D. 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action by causing an appearance to be entered for you in the said Court to the said action ; and in default of your so doing, the said *A.B.* may [by leave of the Court or a judge] * proceed therein, and judgment may be given in your absence.

* See marginal note to Form 2.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [ ] office at

(Signed) *A.B.* of &c.
or
X.Y. of &c.
Solicitor for *A.B.*

In the High Court of Justice.
Division.

[No. 4 applies to the Admiralty Division only.]

4. Admiralty writ.

Form of Memorandum for Renewed Writ.

No. 5.

Form of Memorandum for Renewed Writ (Ord. VIII. r. 1).

5. Memorandum for renewed writ.

In the High Court of Justice.
Division.

Between *A.B.* Plaintiff,
and
C.D. Defendant.

Seal renewed writ of summons in this action indorsed as follows :—

[*Copy original writ and the indorsements.*]

No. 6.

6. Memorandum of appearance.

Memorandum of Appearance (Ord. XII. r. 10).

187 . [*Here put the letter and number.*]

High Court of Justice.
[*Chancery*] Division.

A.B. v. *C.D.*, and others.

Enter an appearance for
in this action.

Dated this day of

X.Y., solicitor for the defendant.

The place of business of *X.Y.* is
His address for service is

or [*C.D.*, defendant in person.

The address of *C.D.* is
His address for service is .]

The said defendant [requires, *or*, does not require] a statement of complaint to be filed and delivered.

(See note to Ord. XIX. r. 2.)

No. 7 (Ord. XII. r. 22).

7. Limited defence as to action for recovery of land.

Limited Defence.

[*Here put the letter and number.*]

In the High Court of Justice.
Queen's Bench (*or* Chancery, C.P., *or*, *&c.*) Division.

Between *A.B.* Plaintiff,
and
C.D. and *E.F.* Defendants.

The defendant *C.D.* limits his defence to part only or the property mentioned in the writ in this action, that is to say, to the close called the Big Field." Limitation of defence.

Yours, &c.,
G.H.,
Solicitor for the said defendant *C.D.*

Mr. *X.Y.*, plaintiff's solicitor.

Section I.

Indorsements on writs.

General Indorsements (*Chancery Division*).

S. 1. Indorsements of Chancery writs.

1. *Creditor to administer Estate.*

1, 2. Administration.

The plaintiff's claim is as a creditor of *X.Y.*, of deceased, to have the [real and] personal estate of the said *X.Y.* administered. The defendant *C.D.* is sued as the administrator of the said *X.Y.* [and the defendants *E.F.* and *G.H.* as his co-heirs-at-law].

2. *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the day of 18 , of *X.Y.* deceased, to have the [real and] personal estate of the said *X.Y.* administered. The defendant *C.D.* is sued as the executor of the said *X.Y.* [and the defendants *E.F.* and *G.H.* as his devisees].

3. *Partnership.*

3. Partnerships.

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound up.

4. *By Mortgagee.*

4. Foreclosure

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the day of made between [*or by deposit of title deeds*], and that the mortgage may be enforced by foreclosure or sale.

Indorsements on writs.

5. Redemption.

5. By Mortgagor.

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [*parties*], and to redeem the property comprised therein.

6. Raising portions.

6. Raising Portions.

The plaintiff's claim is that the sum of *l.*, which by an indenture of settlement dated , was provided for the portions of the younger children of may be raised.

7. Execution of trusts.

7. Execution of Trusts.

The plaintiff's claim is to have the trusts of an indenture dated and made between , carried into execution.

8. Cancellation or rectification.

8. Cancellation or Rectification.

The plaintiff's claim is to have a deed dated and made between [*parties*], set aside or rectified.

9. Specific performance.

9. Specific Performance.

The plaintiff's claim is for specific performance of an agreement dated the day of , for the sale by the plaintiff to the defendant of certain [*freehold*] hereditaments at .

S. 2. Indorsement of money demands.

[Section 2 provides indorsements where the claim is a money demand, *e.g.*, for money lent, rent, fees, medical attendance, contribution by security.]

Section III.

Indorsement for Costs.

And *l.* for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days [*or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed.

S. 4. Indorsement for damages.

[Section 4 provides indorsements for writs for damages and other claims, *e.g.*, breach of contract, assault, negligence, fraud, trespass, &c.]

Mandamus.

(*Add to Indorsement:*) "And for a mandamus."

(*Add to Indorsement:*) "And for an injunction." — Indorsements on writs.

Add to Indorsement where claim is to land, or to establish title, or both: — Injunction.

"And for mesne profits." — Mesne profits

"And for an account of rents or arrears of rent." — Arrears of rent.

"And for breach of covenant for [*repairs*]." — Breach of covenant.

[Section 5 provides forms for probate actions only.] — S. 5. Probate.

[Section 6 provides forms for admiralty actions only.] — S. 6. Admiralty.

[Section 7 provides special indorsements under Ord. III., r. 6, *e.g.*— — S. 7. Special indorsements.

The plaintiff's claim is against the defendant *A.B.* as principal and against the defendant *C.D.* as surety, for the price of goods sold to *A.B.* The following are the particulars:—[*setting them out*].

SECTION VIII. — S. 8. Indorsement on writ of character of parties.

Indorsement of Character of Parties.

The plaintiff's claim is as executor [*or administrator*] of *C.D.*, deceased, for, *&c.* — Executors.

The plaintiff's claim is against the defendant *A.B.*, as executor [*or, &c.*] of *C.D.*, deceased, for, *&c.* — By or against executor.

The plaintiff's claim is against the defendant *A.B.*, as executor of *X. Y.*, deceased, and against the defendant *C.D.*, in his personal capacity, for, *&c.*

The claim of the plaintiff *C.D.* is as executrix of *X.Y.*, deceased, and the claim of the plaintiff *A.B.* as her husband, for — Married woman executrix.

The claim of the plaintiff is against the defendant *C.D.*, as executrix of the defendant *C.D.*, deceased, and against the defendant *A.B.*, as her husband, for

The plaintiff's claim is as trustee under the bankruptcy of *A.B.*, for — Trustees in bankruptcy.

The plaintiff's claim is against the defendant as trustee under the bankruptcy of *A.B.*, for

The plaintiff's claim is as [*or the plaintiff's claim is against the defendant as*] trustee under the will of *A.B.* [*or under the settlement upon the marriage of A.B. and X.Y. his wife*].

Indorsements on writs.

The plaintiff's claim is as public officer of the Bank, for

Public officer.

The plaintiff's claim is against the defendant as public officer of the Bank, for

Heir-at-law.

The plaintiff's claim is against the defendant *A.B.* as principal, and against the defendant *C.D.* as public officer of the Bank, as surety, for

The plaintiff's claim is against the defendant as heir-at-law of *A.B.*, deceased.

The plaintiff's claim is against the defendant *C.D.* as heir-at-law and against the defendant *E.F.* as devisee of lands under the will of *A.B.*

The plaintiff's claim is as well for the Queen as for himself, for

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SCHEDULE B.

1. Third party notice.

FORM 1 (Ord. XVI. r. 18.)

Notice by Defendant to Third Party.

187 . [*Here put the letter and number.*]

Notice filed , 187 .

In the High Court.
Queen's Bench Division.

Between *A.B.*, Plaintiff,
and
C.D., Defendant.

To Mr. *X.Y.*

Take notice that this action has been brought by the plaintiff against the defendant [as surety for *M.N.*, upon a bond conditioned for payment of 2000*l.* and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are [his co-surety under the said bond, *or*, also surety for the said *M.N.*, in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of , A.D.].]

Or [as acceptor of a bill of exchange for 500*l.*, dated the day of , A.D. , drawn by you before and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1000 tons of coal. Third party notice.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.]

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant *C.D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant *C.D.* and yourself to dispute the validity of the judgment in this action, whether obtained by consent or otherwise.

(Signed) *E.T.*

Or,

X.Y.,

Solicitor for the defendant.

E.T.

Appearance to be entered at

FORM 2 (Ord. XX. r. 3.). Forms of pleadings, &c.

187 . [*Here put the letter and number.*] 2. Confession of defence.

In the High Court.
Queen's Bench Division.

Between *A.B.*, Plaintiff,
and
C.D., Defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

FORM 3 (Ord. XXI. r. 4). 3. Statement of claim where writ specially indorsed.

187 . [*Here put the letter and number*]

In the High Court of Justice.
Division.

Between *A.B.*, Plaintiff,
and
C.D., Defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

Forms of pleading, &c.

FORM 4 (Ord. XXII. r. 6).

4. Notice of counter-claim.

"To the within-named *X.Y.*

"Take notice that if you do not appear to the within-counter-"claim of the within-named *C.D.* within eight days from the service "of this defence and counter-claim upon you, you will be liable to "have judgment given against you in your absence.

"Appearances are to be entered at ."

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5. Payment into Court.

FORM 5 (Ord. XXX. r. 2).

Notice of Payment into Court.

In the High Court of Justice. 1875. B. No.
Q.B. Division.

A.B. v. *C.D.*

Take notice that the defendant has paid into Court *l.*, and says that that sum is enough to satisfy the plaintiff's claim [*or the plaintiff's claim for, &c.*]

To Mr. *X.Y.*,
the Plaintiff's Solicitor.

Z.,
Defendant's Solicitor.

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6. Payment into Court.

FORM 6 (Ord. XXX. r. 4).

Acceptance of Sum paid into Court.

In the High Court of Justice.
Q.B. Division. 1875. B. No.

A.B. v. *C.D.*

Take notice that the plaintiff accepts the sum of *l.*, paid by you into Court in satisfaction of the claim in respect of which it is paid in.

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7. Interrogatories.

FORM 7 (Ord. XXXI. r. 3).

Form of Interrogatories.

In the High Court of Justice. 1874. B. No.
Division.

Between *A.B.*, Plaintiff,
and
C.D., *E.F.*, and *G.H.*, Defendants.

Forms of pleading, &c.

Interrogatories on behalf of the above-named [*plaintiff*, or *defendant C.D.*] for the examination of the above-named [*defendants E.F. and G.H.*, or *plaintiff*].

1. Did not, &c.
2. Has not, &c.

&c. &c. &c.

[*The defendant* E.F. *is required to answer the interrogatories numbered* .]

[*The defendant* G.H. *is required to answer the interrogatories numbered* .]

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8. Answer.

FORM 8 (Ord. XXXI. r. 7).

Form of Answer to Interrogatories.

In the High Court of Justice. 1874. B. No.
Division.

Between *A.B.*, Plaintiff,
and
C.D., *E.F.*, and *G.H.*, Defendants.

The answer of the above-named defendant *E.F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E.F.*, make oath and say as follows :—

.....

....

---

9. Affidavit as to documents.

FORM 9 (Ord. XXXI. r. 13).

Form of Affidavit as to Documents.

In the High Court of Justice. 1874. B. No.
Division.

Between *A.B.*, Plaintiff,
and
C.D., Defendant.

I, the above-named defendant *C.D.*, make oath and say as follows :

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

Forms relating to discovery.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody or power, or in the possession, custody or power, of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

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10. Notice to produce.

FORM 10 (Ord. XXXI. r. 15).

Form of Notice to produce Documents.

In the High Court of Justice.
Q.B. Division.

A.B. v. *C.D.*

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim*, or *defence*, or *affidavit, dated the day of* A.D.]

Describe documents required.

X.Y.,
Solicitor to the

To *Z.*,
Solicitor for

Forms relating to discovery.

FORM 11 (Ord. XXXI. r. 16).

11. Notice to inspect.

Form of Notice to Inspect Documents.

In the High Court of Justice.
Q. B. Division.

A.B. v. *C.D.*

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [*except the deed numbered in that notice*] at my office on Thursday next the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. , on the ground that [*state the ground*].

FORM 12 (Ord. XXXII. r. 3).

12. Notice to admit.

Form of Notice to admit Documents.

In the High Court of Justice.
Division.

A.B v. *C.D.*

Take notice that the plaintiff [*or defendant*] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his solicitor or agent, at , on , between the hours of ; and the defendant [*or plaintiff*] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively ; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To *E.F.*, solicitor [*or agent*] for defendant [*or plaintiff*].
G.H., solicitor [*or agent*] for plaintiff [*or defendant*].

[*Here describe the documents, the manner of doing which may be as follows:—*]

Forms relating to discovery.

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between *A.B.* and *C.D.* first part, and *E.F.* second part	January 1, 1848.
Indenture of lease from *A.B* to *C.D.*	February 1, 1848.
Indenture of release between *A.B.*, *C.D.* first part, &c.	February 2, 1848.
Letter—defendant to plaintiff	March 1, 1848.
Policy of insurance on goods by ship "Isabella," on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between *C.D.*, captain of said ship, and *E.F.*	January 1, 1848.
Bill of exchange for 100*l.* at three months, drawn by *A.B.* on and accepted by *C.D.*, indorsed by *E.F.* and *G.H.*	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate, served, sent, or delivered, when, how, and by whom.
Register of baptism of *A.B.* in the parish of *X.*	January 1, 1848	
Letter—plaintiff to defendant	February 1, 1848	Sent by General Post, February 2, 1848.
Notice to produce papers	March 1, 1848	Served March 2, 1848, on defendant's attorney by *E.F.*
Record of a Judgment of the Court of Queen's Bench in an action, *J. S.* v. *J.N.*	Trinity Term 10th Vic.	
Letters Patent of King Charles II.'s in the Rolls Chapel	January 1, 1680.	

13. Special case.

FORM 13 (Ord. XXXIV. r. 5).

Setting down Special Case.

1875. B. No.

In the High Court of Justice.
Division.

Between *A.B.*, Plaintiff,
and
C.D. and others, Defendants.

Set down for argument the special case filed in this action on the day of , 187 .

X.Y., Solicitor for

FORM 14 (XXXVI. r. 8).

Form of Notice of Trial.

Forms relating to trial.

14. Notice of trial.

In the High Court of Justice.
Division.

A.B. v. *C.D.*

Take notice of trial of this action [*or of the issues in this action ordered to be tried*] by a judge and jury [*or as the case may be*] in Middlesex, [*or as the case may be*] for the day of next.

X.Y., Plaintiff's Solicitor [*or as the case may be*].

Dated

To *Z.*, Defendant's Solicitor [*or as the case may be*].

FORM 15 (Ord. XXXVI. r. 24).

Form of Certificate of Officer after Trial by a Jury.

15. Form of certificate after trial by jury.

30th November, 1876. 1876. No.

In the High Court of Justice.
Division.

Between *A.B.*, Plaintiff,
and
C.D., Defendant.

I certify that this action was tried before the Honourable Mr. Justice and a special jury of the county of on the 12th and 13th days of November, 1876.

The jury found [*state findings*].

The judge directed that judgment should be entered for the plaintiff for *l.* with costs of summons [*or as the case may be*].

A.B.,
[Title of Officer.]

FORM 16.

Affidavit of Scripts in the Probate Court.

16. Script in Probate action.

In the High Court of Justice.
Probate Division.

Between *A.B.*, Plaintiff,
and
C.D., Defendant.

Forms relating to trial.

I, *A.B.* of , in the county of , party in this cause, make oath and say, that no paper or parchment writing, being or purporting to be or having the form or effect of a will or codicil or other testamentary disposition of *E.F.*, late of , in the county of , deceased, the deceased in this cause, or being or purporting to be instructions for, or the draft of, any will, codicil, or testamentary disposition of the said *E.F.*, has at any time, either before or since his death, come to the hands, possession, or knowledge of me, this deponent, or to the hands, possession, or knowledge of my solicitors in this suit, so far as is known to me, this deponent, save and except the true and original last will and testament of the said deceased now remaining in the principal registry of this Court [*or* hereunto annexed, *or as the case may be*], the said will bearing date the day of 18 [*or as the case may be*], also save and except [*here add the dates and particulars of any other testamentary papers of which the deponent has any knowledge*].

(Signed) *A.B.*

Sworn at on the day of 18 .

Before me,

[*Person authorised to administer oaths under the Act*].

Statements of claim and other pleadings.

SCHEDULE C.

This schedule* gives the following forms of statements of claim and other pleadings :—

* These forms will be found in full in all editions of the Statutes for 1875, scheduled to 38 & 39 Vict. c. 77.

1. Action for account stated.

2. Action for administration of real and personal estate and a receiver. The administrator defends by denying the plaintiff's title, on which defence plaintiff joins issue.

3. Action for administration of real and personal estate, to which the executor pleads *plene administravit* and plaintiff joins issue.

4. Action for administration of trusts of will, and to make executors liable for breach of trust in carrying on a business and for a receiver. The executors defend by pleading that they are taking the accounts of the business in Chancery, and plaintiff joins issue.

5. Action for damages against *del credere* agents for negligence, the defendants deny liability as *del credere* agents, and plaintiff joins issue.

6, 7. Action upon bill of exchange.

8. Action upon bill of lading.

Form of statements of claim.

9. Action upon a bottomry bond, with a statement of defence, reply, and rejoinder.

10. Action upon a charter party, with pleadings similar to 8.

11, 12. Action for collision and for costs of equipment in the Admiralty Division.

13. Action for damages for false imprisonment.

14. Action for foreclosure by first mortgagee against mortgagor and second mortgagee. The defendant puts in a defence that the deed of second mortgagee is incorrectly stated, and a counter-claim founded on mistake.

15. Action for damages caused by fraudulent representations of plaintiff, with statement of defence and reply.

16. Action upon a guarantee.

17. Action for letters of administration in the Probate Division.

18. Action for ejectment by landlord.

19. Action for supply of necessaries in the Admiralty Division.

20. Action for damages caused by defendant's negligence.

21. Action for possession of a ship in the Admiralty Division.

22. Action on a promissory note.

23. Action for probate of a will in solemn form.

24, 25. Action for recovery of land; in 25 a defence and counter-claim for the specific performance of an agreement to lease, and a reply in the Chancery Division, the action being transferred, and a joinder of issue.

26. Action for salvage.

27. Action for damages for trespass.

28. Demurrer, as follows :—

Form of demurrer.

No. 28.

Form of Demurrer

In the High Court of Justice,
Division.

A.B. v. *C.D.*

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint *or* defendant's statement of defence, *or* of set-off, *or* of counter-claim], [*or* to so much of the plaintiff's statement of complaint as claims . . . . *or* as alleges as a breach of contract the matters mentioned in paragraph 17, *or as the case may be*], and says that the same is bad in law on the ground that [*here state a ground of*

Form of Demurrer.

demurrer] and on other grounds, sufficient in law to sustain this demurrer.

See as to setting down demurrers, Registrar's Regulations, March 15 1860, *ante*, p. 507.

No. 29.

Memorandum of Entry of Demurrer for Argument.

1874. B. No.

In the High Court of Justice,
Division.

A.B. v. *C.D.*

Enter for the argument the demurrer of
to

X.Y.,
Solicitor for the plaintiff [*or, &c.*]

Forms.

SCHEDULE D.

1, 2, 3. Judgment in cases of default of appearance.

4, 5, 6, 7. At trial, with or without jury, and before referee, and on motions for udgment.

Appendix D provides forms of judgment in cases of—(1) Default of appearance and defence in case of liquidated demand; (2) Default of appearance in action for recovery of land; (3) Default of appearance and defence after assessment of damages (see Ord. XLI. r. 1); (4) Judgment at trial by judge with jury; (5) Judgment after trial with jury; (6) Judgment after trial before referee; (7) Judgment upon motions for judgment.

SCHEDULE E.

ORD. XLII. r. 10.

App. E. Forms of præcipes for writs.

Appendix E provides forms of præcipe for the writs of (1) Fieri facias; (2) Elegit; (3) Venditioni exponas; (4) Fieri facias de bonis ecclesiasticis; (5) Sequestrari facias de bonis ecclesiasticis; (6) Writ of sequestration; (7) Writ of possession; (8) Writ of delivery; (9) Writ of attachment.

SCHEDULE F.

ORD. XLII. r. 12.

App. F. 1. Writ of *fi fa.*, *elegit*, &c.

Appendix F provides forms of the following writs (1) Writs of fieri facias, in pursuance of a judgment for a sum of money and interest (if there is no judgment, as in the case of a discontinuance, the form may be altered, *Bolton* v. *Bolton*, 24 W. R. 663); (2) Elegit; (3) Venditioni exponas; (4) Fieri facias de bonis ecclesiasticis; (6) Sequestrari facias de bonis ecclesiasticis; (7) Possession; (8) Delivery; (9) Attachment.

SECOND APPENDIX.—SOLICITORS' COSTS AND FEES.

Schedule to Additional Rules, August, 1875, Solicitors' Costs and Fees.

—o—

SCHEDULE TO ADDITIONAL RULES (COSTS), 1875.

(P. 629, *ante*.)

1. Writs, Summonses, and Warrants.

1. Writs, summonses, warrants.

Writ of summons for the commencement of any action, 6*s*. 8*d*. ; 13*s*. 4*d*. ; and for indorsement of claim if special, 5*s*. ; 5*s*. Concurrent writ of summons, 6*s*. 8*d*.; 6*s*. 8*d*. Renewal of writ of summons, 6*s*. 8d.; 6*s*. 8*d*. Notice of a writ for service in lieu of writ out of jurisdiction, 4*s*. ; 5*s*. Writ of inquiry, 1*l*. 1*s*.; 1*l*. 1*s*. Writ of mandamus on injunction, 10*s*. ; 1*l*. 1*s*. Or per folio, 1*s*. 4*d*. ; 1*s*. 4*d*. Writ of subpœna ad testificandum duces tecum, 6*s*. 8*d*.; 6*s*. 8*d*. And if more than four folios, for each copy beyond four, 1*s*. 4*d*.; 1*s*. 4d. Writ or writs of subpœna ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three, 6*s*. 8*d*. ; 6*s*. 8*d*. Writ of distringas, pursuant to statute 5 Vict. c. 8, 13*s*. 4*d*.; 13*s*. 4*d*, Writ of execution, or other writ to enforce any judgment or order, 7*s*.; 10*s*. And if for more than four folios for each folio beyond four, 1*s*. 4*d*.; 1*s*. 4*d*. Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal, 6*s*. 8*d*. ; 6*s*. 8*d*. Notice thereof to serve on sheriff, 4*s*.; 5*s*. Any writ not included in the above, 7*s*.; 10*s*.

These fees include all endorsements and copies, or præcipes, for the officer sealing them, and attendances to issue, or seal, but not the Court fees (see W. N. (1876) 22).

Summons to attend at judges' chambers, 3*s*. ; 6*s*. 8*d*. Or if special, at taxing officer's discretion, not exceeding, 6*s*. 8*d*. ; 1*l*. 1*s*. Copy for judge, when required, 2*s*.; 2*s*. Or per folio, 4*d*. Original summons for proceedings in chambers in the Chancery division, 13*s*. 4*d*.; 1*l*. 1*s*. And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped, 13*s*. 4*d*. ; 13*s*. 4d. Copy for the judge, 2*s*.; 2*s*. Or per folio, 4*d*. Endorsing same and copies under 8th rule of the 35th of the Consolidated General Orders of the Court of Chancery, 6*s*. 8*d*. ; 6*s*. 8*d*.

2. Services, Notices (to Creditors, &c.), and Demands.

2. Services, notices, demands.

Service of any writ, summons, warrant, interrogatories, petition, order, notice, or demand on a party who has not entered an appearance, and if not authorized to be served by post, 5*s*. ; 5*s*. If served at a distance of more than two miles from the nearest place of business, or office of the solicitor

Schedule to Additional Rules, August, 1875, Solicitors' Costs and Fees.

serving the same, for each mile beyond such two miles therefrom, 1*s.* ; 1*s* Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition, 7*s.*; 7*s.* Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.

For service out of the jurisdiction such allowance is to be made as the taxing-master shall think fit.

Service where an appearance has been entered on the solicitor or party, 2*s.* 6*d.*; 2*s.* 6d. Or if authorized to be served by post, 1*s.* 6*d.*; 1*s.* 6*d.*

Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.

In addition to the above fees, the following allowances are to be made :— As to writs, if exceeding two folios, for copy for service per folio beyond such two, 4*d.*; 4*d.* As to summons to attend at the judges' chambers, for each copy to serve, 1*s.*; 2*s.* Or per folio, 4*d.*; 4*d.* As to notice in proceedings to wind up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributories, 1*s.*; 1*s.* And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call, 1*s.*; 1*s.* And for drawing notice to be served on contributories or creditors of a meeting, per folio, 1*s.*; 1*s.* For each copy of the last-mentioned notice to serve, per folio, 4*d.*; 4*d.* For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any, 1*s.*; 1*s.* For preparing notice to produce or admit, and one copy, 5*s.*; 7*s.* 6*d.* If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio, 8*d.*; 1*s.* 4*d.* And for each copy beyond the first, such allowance as the taxing master shall think proper, not exceeding per folio, 4*d.*; 4*d.* For preparing notice of motion, 2*s.*; 5*s.* Or per folio, 1*s.*; 1*s.* Copy for service, 1*s.*; 1*s.* Or per folio, 4*d.* For preparing any necessary or proper notice, not otherwise provided for and demand, 1*s.* 6*d.*; 1*s.* 6*d.* Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three, 1*s.*; 1*s.* And for each copy for service, per folio beyond such three, 4*d.*; 4*d.* Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio, 4*d.*; 4*d.*

Except as otherwise provided, the allowances for services include copies for service. Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together. In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than £3. Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.

3. Appearances.

3. Appearances.

Entering any appearance, 6*s.* 8*d* ; 6*s.* 8*d.* If entered at one time, for more than one person, for every defendant beyond the first, 1*s.* ; 2*s.* If a

person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above, 6*s.* 8*d.* ; 6*s.* 8*d.*

Schedule to Additional Rules, August, 1875, Solicitors' Costs and Fees.

4. Instructions.

4. Instructions.

To sue or defend, 6*s.* 8*d.* ; 13*s.* 4*d.* For statement of complaint, 13*s.* 4*d.* ; 2*l.* 2*s.* For statement or further statement of defence, 6*s.* 8*d.* ; 13*s.* 4*d.* For counter-claim, 6*s.* 8*d.* ; 13*s.* 4*d.* For reply by plaintiff when defendant sets up a counter claim, 13*s.* 4*d.* ; 1*l.* 1*s.* For reply or further reply in any other case by plaintiff or other person, with or without joinder of issue, 6*s.* 8*d.* ; 13*s.* 4*d.* For confession of defence, 6*s.* 8*d.* ; 13*s.* 4*d.* For joinder of issue without other matter and for demurrer, 6*s.* 8*d.* ; 13*s.* 4*d.* For special case, special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness, 6*s.* 8*d.* ; 13*s.* 4*d.* To amend any pleading, 6*s.* 8*d.* ; 13*s.* 4*d.* For affidavit in answer to interrogatories, and other special affidavits, 6*s.* 8*d.* ; 6*s.* 8*d.* To appeal, 13*s.* 4*d.* ; 1*l.* 1*s.* To add parties by order of Court or judge, 6*s.* 8*d.* ; 13*s.* 4*d.* For counsel to advise on evidence when the evidence in chief is to be taken orally, 6*s.* 8*d.* ; 6*s.* 8*d.* Or not to exceed, 13*s.* 4*d.* ; 1*l.* 1*s.* For counsel to make any application to a Court or judge where no other brief, 6*s.* 8*d.* ; 10*s.* For brief on motion for special injunction, 13*s.* 4*d.* ; 1*l.* 1*s.* For brief on hearing or trial of action upon notice of trial given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages, 1*l.* 1*s.* ; 2*l.* 2*s.*

For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing-officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.

The fees for instructions for brief are not to apply to a hearing on further consideration.

5. Drawing Pleadings and other Documents.

5. Drawing pleadings, &c.

Statement of claim, 10*s.* ; 1*l.* 1*s.*—or per folio, 1*s.* ; 1*s.* Statement of defence, 5*s.* ; 10*s.*— or per folio, 1*s.* ; 1*s.* Statement of defence and counter-claim, 5*s.* ; 1*l.* 1*s.*—or per folio, 1*s.* ; 1*s.* Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, demurrer, and any other pleading (not being a petition or summons) and amendments of any pleading, 5*s.* ; 10*s.* Particulars, breaches, and objections, when required, and one copy to deliver, 5*s.* ; 6*s.* 8*d.* Or such amount as the taxing officer shall think fit, not exceeding per folio, 8*d.* ; 1*s.* 4*d.* If more than one copy to be delivered, for each other copy per folio, 4*d.* ; 4*d.* Special case, whether original or in action, affidavits in answer to interrogatories, and other special affidavits, special petitions, and interrogatories, per folio, 1*s.* ; 1*s.* Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, demurrer, special case and petition before a Court or judge, sheriff, commissioner, referee, examiner, or officer of the Court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio, 1*s.* ; 1*s.* Brief on application to add parties, 6*s.* 8*d.* ; 10*s.* Or per folio, 1*s.* ; 1*s.* Brief on further consideration, per sheet of 10 folios, 6*s.* 8*d.* ; 6*s.* 8*d.* Accounts, statements, and other documents for the Judges' Chambers, when

Schedule to Additional Rules, August, 1875, Solicitors' Costs and Fees.

required, and fair copy to leave, per folio, 8*d.* ; 1*s.* 4*d.* Advertisements to be signed by judge's clerk, including attendance therefor, 6*s.* 8*d.* ; 13*s.* 4*d.* Bill of costs for taxation, including copy for the taxing officer, 8*d.* ; 8*d.*

6. Copies.

6. Copies.

Of pleadings, briefs, and other documents, where no other provision is made, at per folio, 4*d.*; 4*d.* Where pursuant to rules of Court any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the Court), at per folio, 4*d.*; 4*d.* And for examining the proof print, at per folio, 2*d.*; 2*d.* And for printing the amount actually and properly paid to the printer, not exceeding per folio, 1*s.*; 1*s.* And in addition for every 20, beyond the first 20 copies, at per folio, 1*d.* ; 1*d.*

Allowances for printing.

Where any part shall properly be printed in a foreign language, or as a facsimile, or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.

These allowances are to include all attendances on the printer.

* This item was added by r. 20 of June, 1876, p. 645, *ante.*

The allowance * for printing a document not exceeding ten folios shall be 10*s.*, and in addition for every twenty beyond the first twenty copies of any document not exceeding twenty-four folios. The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.

In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (videlicet) :—

Of any pleading for delivery to the opposite party, or filing in default of appearance, and of any special case for filing, and of any petition of right for presentation, if presented in print, and for the solicitor of the Treasury, and service on any party, and of any pleading, special case, or petition of right, for the use of the Court or judge, and of any affidavit to be sworn to in print, and of any pleading, special case, petition of right, or evidence for the use of counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio, 2*d.* ; 3*d.*

Such additional allowances for printed copies for the Court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause.

Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shewn and considered by the taxing officer.

Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted, 1*s.* ; 5*s.* Or per folio, 4*d.* ; 4*d.*

Schedule to Additional Rules, August, 1875, Solicitors' Costs and Fees.

7. Perusals.

7. Perusals.

Of statement of complaint, statement of defence, reply, joinder of issue, demurrer, and other pleading (not being a petition or summons) by the solicitor of the party to whom the same are delivered, 6*s.* 8*d.* ; 13*s.* 4*d.* Or per folio, 4*d.* Of amendment of any such pleading in writing, 6*s.* 8*d.* ; 6*s.* 8*d.* Or per folio, 4*d.* If same reprinted, 6*s.* 8*d.* ; 13*s.* 4*d.* Or per folio of amendment, 4*d.* Of interrogatories to be answered by a party by his solicitor, 6*s.* 8*d.* ; 13*s.* 4*d.* Or per folio, 4*d.* Of special case by the solicitor of any party except the one by whom it is prepared, 6*s.* 8*d.* ; 13*s.* 4*d.* Or per folio, 4*d.* Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Order XVI. rule 18, and of defendant's statement of defence and counter-claim served on a person not a party under Order XXII, rule 6, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of complaint is also to be allowed unless the solicitor has been previously allowed such perusal, 6*s.* 8*d.* ; 13*s.* 4*d.* Or per folio, 4*d.* Of notice to produce and notice to admit by the solicitor of the party served, 6*s.* 8*d.* ; 13*s.* 4*d.* Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio, 4*d.* ; 4*d.*

8. Attendances.

8. Attendances.

To obtain consent of next friend to sue in his name, 6*s.* 8*d.* ; 13*s.* 4*d.* To deliver or file any pleading (not being a petition or summons) and a special case, 3*s.* 4*d.* ; 6*s.* 8*d.* To inspect, or produce for inspection, documents pursuant to a notice to admit, 6*s.* 8*d.* ; 13*s.* 4*d.* Or per hour, 6*s.* 8*d.* ; 6*s.* 8*d.* To examine and sign admissions, 6*s.* 8*d.* ; 13*s.* 4*d.* To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under Order XXXI, rule 14, 6*s.* 8*d.* ; 6*s.* 8*d.* Or per hour, 6*s.* 8*d.* ; 6*s.* 8*d.* To obtain or give any necessary or proper consent, 6*s.* 8*d.* ; 6*s.* 8*d.* To obtain an appointment to examine witnesses, 6*s.* 8*d.* ; 6*s.* 8*d.* On examination of witnesses before any examiner, commissioner, officer, or other person, 13*s.* 4*d.* ; 13*s.* 4*d.* Or according to circumstances, not to exceed, 2*l.* 2*s.* ; 2*l.* 2*s.* Or if without counsel, not to exceed, 3*l.* 3*s.* On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit, 6*s.* 8*d.* ; 6*s.* 8*d.* On a summons at Judges' Chambers, 6*s.* 8*d.* ; 6*s.* 8*d.* Or according to circumstances not to exceed, 1*l.* 1*s.* ; 1*l.* 1*s.*

In chambers.

In the Chancery Division, all allowances for attending at th judges' chambers are to be by the judge or chief clerk as heretofore.

To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy, 6*s.* 8*d.* ; 6*s.* 8*d.* On counsel with brief or other papers—If counsel's fee one guinea, 3*s.* 4*d.* ; 6*s.* 8*d.* If more and under five guineas, 6*s.* 8*d.* ; 6*s.* 8*d.* If five guineas and under 20 guineas, 6*s.* 8*d.* ; 13*s.* 4*d.* If 20 guineas, 13*s.* 4*d.* ; 1*l.* 1*s.* If 40 guineas or more, 2*l.* 2*s.* On consultation or conference with counsel, 13*s.* 4*d.* ; 13*s.* 4*d.* To enter or set down action, demurrer, special case, or appeal, for hearing or trial, 6*s.* 8*d.* ; 6*s.* 8*d.* In Court on motion of course and on counsel and for order, 10*s.* ; 13*s.* 4*d.* To present petition for order of course and for order, 6*s.* 8*d.* ; 13*s.* 4*d.* In Court on every special motion, each day, 6*s.* 8*d.* ;

Schedule to Additional Rules, August, 1875, Solicitors' Costs and Fees.

13*s.* 4*d.* On same when heard each day, 13*s.* 4*d.* ; 13*s.* 4*d.* Or according to circumstances, 1*l.* 1*s.* ; 2*l.* 2*s.* On demurrer, special case, or special petition, or application adjourned from the Judges' Chambers, when in the special paper for the day, or likely to be heard, 6*s.* 8*d.* ; 10*s.* On same when heard, 13*s.* 4*d.* ; 1*l.* 1*s.* Or according to circumstances, not to exceed, 1*l.* 1*s.* ; 2*l.* 2*s.* On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge, with or without a jury, or commissioner, or referee, or on assessment of damages, when in the paper, 10*s.* ; 10*s.* When heard or tried, 13*s.* 4*d.* ; 1*l.* 1*s.* Or according to circumstances, 2*l.* 2*s.* ; 2*l.* 2*s.* When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent, 2*l.* 2*s.* ; 3*l.* 3*s.* And expenses (besides actual reasonable travelling expenses) each day, including Sundays, 1*l.* 1*s.* ; 1*l.* 1*s.* Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case, 1*l.* 1*s.* ; 1*l.* 11*s.* 6*d.* The expenses in such case to be rateably divided. To hear judgment when same adjourned, 6*s.* 8*d.* ; 13*s.* 4*d.* Or according to circumstances, 13*s.* 4*d.* ; 1*l.* 1*s.* To deliver papers (when required) for the use of a judge prior to a hearing, 6*s.* 8*d.* ; 6*s.* 8*d.* If more than one judge, 13*s.* 4*d.* ; 13*s.* 4*d.* On taxation of a bill of costs, 6*s.* 8*d.* ; 6*s.* 8*d.* Or according to circumstances, not to exceed 2*l.* 2*s.* ; 2*l.* 2*s.* In causes for purposes within the cognizance of the Court of Chancery before the Act passed, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made. To obtain or give an undertaking to appear, 6*s.* 8*d* ; 6*s.* 8*d.* To present a special petition, and for same answered, 6*s.* 8*d.* ; 6*s.* 8*d.* On printer to insert advertisement in gazette, 6*s.* 8*d.* ; 6*s.* 8*d.* On printer to insert same in other papers, each printer, 6*s.* 8*d*—or every two, 6*s.* 8*d.* On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing, 6*s.* 8*d.* ; 6*s.* 8*d.* For an order drawn up by the chief clerk, and to get same entered, 6*s.* 8*d.* ; 6*s.* 8*d.* On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same, 6*s.* 8*d.* ; 6*s.* 8*d.* To mark conveyancing counsel or taxing master, 6*s.* 8*d.* ; 6*s.* 8*d.* For preparing and drawing up an order made at chambers in proceedings to wind-up a company, and attending for same, and to get same entered, 13*s.* 4*d.* ; 13*s.* 4*d.* And for engrossing every such order, per folio, 4*d.* ; 4*d.*

Order of course.

An order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk.

9. Oaths and exhibits.

9. Oaths and Exhibits.

Commissioners to take oaths or affidavits. For every oath, declaration, affirmation or attestation upon honour, in London or the country, 1*s.* 6*d.* ; 1*s.* 6*d.* The solicitor for preparing each exhibit in town or country, 1*s.* ; 1*s.* The commissioner for marking each exhibit, 1*s.* ; 1*s.*

10. Term fees.

10. Term Fees.

For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter, by or affecting the party, other than the issuing and serving the writ of summons, shall take place, 15*s.* ; 15*s.* And further, in country agency causes or matters for letters, 6*s.* ; 6*s.* Where no proceedings in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it. In addition to the above an allowance is to be made for the necessary expense of postages, carriage, and transmission of documents.

THIRD APPENDIX.

Schedule to Order, October, 1875.

—o—

SCHEDULE TO ORDER AS TO COURT FEES, 1875.

(P. 652, *ante*.)

An order or rule herein referred to by number shall mean the order or rule so numbered in the first schedule to the Supreme Court of Judicature Act, 1875. Court fees.

1. Summonses, Writs, Commissions, and Warrants.

1. Summonses, writs, commissions, and warrants.

On sealing a writ of summons for commencement of an action, 5*s.*; 10*s.* On sealing a concurrent, renewed or amended writ of summons for commencement of an action, 2*s.* 6*d.*; 2*s.* 6*d.* On sealing a notice for service under Order XVI, r. 18, 2*s.* 6*d.*; 2*s.* 6*d.* On sealing a writ of mandamus or injunction, 10*s.*; 1*l.* On sealing a writ of subpœna not exceeding three persons, 2*s.* 6*d.*; 5*s.* On sealing every other writ, 5*s.*; 10*s.* On sealing a summons to originate proceedings in the Chancery Division, 5*s.*; 10*s.* On sealing a duplicate thereof, 1*s.*; 5*s.* On sealing a copy of same for service, 1*s.*; 5*s.* On sealing or issuing any other summons or warrant, 2*s.*; 3*s.* On sealing or issuing a commission to take oaths or affidavits in the Supreme Court, 5*l.*; 5*l.* Every other commission, 1*l.*; 1*l.* On making a copy of a petition of right for service, 1*s.*; 5*s.*

2. Appearances.

2. Appearances.

On entering an appearance for each person, 2*s.*; 2*s.*

3. Copies.

3. Copies.

For a copy of a written deposition of a witness to enable a party to print the same, for each folio, 4*d.*; 4*d.* For examining a written or printed copy, and marking same as an office copy, for each folio, 2*d.*; 2*d.* For making a copy and marking same as an office copy, for each folio, 6*d.*; 6*d.* For a copy in a foreign language, the actual cost. For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost. For a printed copy of an order, not being an office or certified copy, for each folio, 1*d.*; 1*d.*

4. Attendances.

4. Attendances.

On an application, with or without a subpœna, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer) for each day or part of a day he shall necessarily be absent from his office, 1*l.*; 1*l.*

Schedule to Order, October, 1875.

The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.

5. Oaths.

5. Oaths, &c.

For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same, 1*s.* 6*d.*; 1*s.* 6*d.* And in addition thereto for each exhibit therein referred to and required to be marked, whether annexed or not, 1*s.*; 1*s.*

6. Filing.

6. Filing.

On filing a special case or petition of right, 10*s.*; 1*l.* On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return, 2*s.*; 2*s.* On filing a scheme pursuant to the statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868, 1*l.*; 1*l.* On filing a caveat, 5*s.*; 5*s.*

This is the Railway Companies Act, 1867 (p. 273, *ante*).

7. Certificates.

7. Certificates.

For a certificate of appearance, or of a pleading affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof, 1*s.*; 4*s.*

8. Searches and inspections.

8. Searches and Inspections.

On an application to search for an appearance or an affidavit, and inspecting the same, 1*s.*; 1*s.* On an application to search an index, and inspect a pleading, decree, order, or other record, unless otherwise expressly provided for by any Act of Parliament or this order, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied, 2*s.* 6*d.*; 2*s.* 6*d.* Not exceeding on one day, 10*s.*; 10*s.*

9. Examination by examiners.

9. Examination of Witnesses.

For every witness sworn and examined by an examiner or other officer in his office, including oath, for each hour, 10*s.*; 10*s.* For an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day, 3*l.*; 3*l.*

Schedule to Order, October, 1875.

The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses, which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.

The officer may also require an undertaking, in writing, to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.

These fees are not to apply to the examination of witnesses for the purpose of any inquiry, taxation of costs, or other proceeding before the officer.

10. Hearing.

10. Hearing.

For entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from chambers, 1*l.*; 2*l.*

For a certificate of an associate of the result of trial, 1*l.*; 1*l.*

11. Judgments, Decrees, and Orders.

11. Judgments.

For drawing up and entering a judgment, or a decree of decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal, 10*s.*; 1*l.* For drawing up and entering any other order, whether made in Court or at chambers, 3*s.*; 5*s.* For copy of a plan, map, section, drawing, photograph, or diagram, required to accompany any order, the actual cost.

12. Taking Accounts.

12. Taking accounts.

On taking an account of a receiver, guardian, consignee, bailee, manager, provisional, official, or voluntary liquidator, or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account when the amount found to have been received without deducting any payment shall not exceed 200*l.*, 2*s.*; 2*s.* Where such amount shall exceed 200*l.* for every 50*l.* or fraction of 50*l.*, 6*d.*; 6*d.*

In the case of any such receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution creditor, the fees shall, upon payment, be allowed in the account, unless the Court or judge shall otherwise direct, and in the case of taking the accounts of such other accounting parties the fees shall be paid by the party having the conduct of the order under which such account is taken, as part of his costs of the cause or matter (unless the Court or judge shall otherwise direct), and in such case shall be taken upon the certificate of the result of any such account; but the fees shall be due and

Schedule to Order, October, 1875.

payable, although no certificate is required, on the account taken or on such part thereof as may be taken, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the account.

The officer taking the account may require a deposit of stamps on account of fees before taking the account, not exceeding the fees on the full amount, appearing by the account to have been received, and the officer or his clerk taking such deposit shall make a memorandum thereof on the account.

13. Taxation.

Taxation of Costs.

For taxing a bill of costs where the amount allowed does not exceed 8*l.*, 2*s.*; 4*s.* Where the amount exceeds 8*l.*, ,or every 2*l.* allowed, or a fraction thereof, 6*d.*; 1*s.*

These fees, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs, as taxed, but the fees shall be due and payable if no certificate or allocatur is required on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.

For a certificate or allocatur of the result, not being a judgment, 1*s.*

* P. 415, *ante.*

The 58th Rule* of Order V. of the Chancery Funds Consolidated Rules, 1874, shall continue in force and be acted upon in cases to which it is applicable.

14. Petitions.

14. Petitions.

For answering a petition for hearing in Court, and setting down, 5*s.*; 1*l.* For answering a non-attendable petition, not being a petition for an order of course, 5*s.*; 10*s.* On a matter of course order, on a petition of right, 10*s.*; 10*s.* On an order for a commission on a petition of right, 1*l.*; 1*l.*

15. Registering.

15. Register of Judgments and Lis Pendens.

For registering a judgment or lis pendens, although more than one name may have to be registered, 2*s.* 6*d.*; 2*s.* 6*d.* For re-registering the same, 1*s.*; 1*s.* For a search for each name, 1*s.*; 1*s.* For a certificate of entry of satisfaction, 1*s.*; 1*s.* For certificate of a judgment for registration in

Ireland or Scotland under the Judgments Extension Act, 1868, including affidavit, 2*s.* ; 2*s.* On filing for registration a certificate issued out of Courts of Dublin or Court of Session in Scotland under the same Act, although more than one name may have to be be registered under the same Act, 7*s.* ; 7*s.* On every certificate of the entry of a satisfaction under the same Act, 1*s.* ; 1*s.* For a search made in one or both of the registers of Irish and Scotch judgments, for each name 1*s.* ; 1*s.*

16. Miscellaneous.

16. Miscellaneous.

On a report of a private bill in Parliament, 5*l.* ; 5*l.* On an allowance of bye-laws or table of fees, 1*l.* ; 1*l.* On a fiat of a judge, 5*s.* ; 5*s.* On signing an advertisement, 1*s.* Upon a reference to a Master of the Queen's Bench, Common Pleas, or Exchequer Divisions, or a District Registrar, for the purpose of any investigation or inquiry other than the taking of account for which another fee is herein provided, for every hour or part of an hour the Master or Registrar is occupied, 10*s.* ; 10*s.* A deposit on account of fees before proceeding with such reference, or at any time during the course thereof, may be required and a memorandum thereof shall be delivered to the party making the deposit.

On taking acknowledgment of a deed by a married woman, 1*l* ; 1*l.* On taking a recognizance or bond, 10*s.* ; 10*s.* On taking bail, and taking same off the file and delivering, 2*s* ; 2*s.* On a commitment, 5*s.* ; 5*s.* On an application to produce judge's notes, 5*s* ; 5*s.* On appointment of commissioners under glebe exchange, 1*l.* ; 1*l.* On examining and signing inrolments of decrees and orders, 3*l.* ; 3*l.* On admission or re-admission of a solicitor, 5*l.* ; 5*l.* On a written request for information at the Chancery Pay Office, 2*s.* 6*d.* ; 2*s.* 6*d.* For preparing a power of attorney at the Chancery Pay Office, 3*s.* ; 3*s.* For transcript of an account in the books at the Chancery Pay Office, for each opening 2*s.* ; 2*s.*

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